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No. 86-1217

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH P. RUSSONIELLO, ET AL., PETITIONERS

v.

JOSE J. OLAGUES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court may, consistent with Article III of the Constitution, consider a pre-indictment challenge to the manner and scope of noncoercive investigatory activities by a United States Attorney.

2. Whether, assuming that Article III in some circumstances allows for pre-indictment judicial review of the manner and scope of noncoercive investigatory activities by a United States Attorney, a federal court may enjoin or declare unconstitutional such activities when those activities were not taken in bad faith or for purposes of harassment, do not violate any clearly established rights, and have not been shown to be devoid of legitimate investigatory purpose.

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v.

JOSE J. OLAGUES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Joseph P. Russoniello and David Ilchert, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc Court of Appeals for the Ninth Circuit (App., *infra,* 1a-38a) is reported at 797 F.2d 1511. The prior panel opinion of the court of appeals (App., *infra,* 41a-75a) is reported at 770 F.2d 791. The opinion of the United States District Court for the Northern District of California on summary judgment (App., *infra,* 78a-95a) is unreported. The opinion of the district court on motion to dismiss (App., *infra,* 96a-97a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1986. A suggestion for rehearing en banc by the full court of appeals was denied on December 19, 1986. On November 14, 1986, Justice O'Connor granted an extension of time to and including January 23, 1987 for

the filing of a petition for a writ of certiorari in this case. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II of the Constitution provides in pertinent part:

> The executive Power shall be vested in a President of the United States of America.
>
> * * * * *
>
> * * * he shall take Care that the Laws be faithfully executed * * *.

The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

42 U.S.C. 1973i(c) provides in pertinent part:

> Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives * * *.

STATEMENT

1. Petitioner, Joseph P. Russoniello, is the United States Attorney for the Northern District of California (App., *infra,* 3a), and petitioner, David Ilchert, is the District Director in San Francisco for the United States Immigration and Naturalization Service (*id.* at 5a). In March 1982, Russoniello received information from the Santa Clara County district attorney which indicated that a substantial number of foreign-born persons who were not United States citizens recently had registered to vote in that county, even though as noncitizens they were ineligible to do so (*id.* at 25a). Upon inquiry, Russoniello was further informed that many of these noncitizen registrants either did not speak or were not fluent in English and that many had been told by the persons registering them that they were in fact eligible to vote, either because they were married to a United States citizen or because they had resided in this country for a long period (*id.* at 25a-26a). Based on these facts, Russoniello became concerned that certain persons or organizations were registering or conspiring to register noncitizen voters in violation of 42 U.S.C. 1973i(c) and (d), a statute that he is responsible for enforcing (App., *infra,* 3a-4a, 25a-26a).

Accordingly, on April 19, 1982, Russoniello requested that the district attorneys and voter registrars in nine counties assist him in investigating the extent of noncitizen voter registration in the San Francisco Bay area (App., *infra,* 26a, 78a-80a). Russoniello explained that, based on the information he had seen, persons who did not understand English were quite susceptible to being confused or misled about their eligibility to vote[1] and that such non-

[1] Russoniello later learned that the Spanish translation of the voter registration form being used in these counties erroneously stated that a registrant "should" be, rather than "must" be, a United States citizen

citizen registrants could be identified by their requests for bilingual ballots (*id.* at 79-80a).[2] He proposed that the voter registrar in each county randomly select from public records and submit to him the names of 25 recently-registered, foreign-born voters who had requested bilingual voting ballots, which he would forward to the Immigration and Naturalization Service (INS) for verification of the registrants' citizenship status (*ibid.*). Russoniello further suggested that, as to registrants whom INS could not positively identify as citizens, the district attorneys should contact the registrants, determine whether they were citizens and, if not, determine who, if anyone, had encouraged them improperly to register (*id.* at 43a, 80a). He advised that, while he did not intend to prosecute any of the noncitizen registrants, he would seriously "consider" prosecuting any group or individual who had deliberately conspired to register unqualified voters (*ibid.*).

The voter registrars subsequently submitted a total of 168 names to Russoniello, which he forwarded to INS (App., *infra,* 43a). By reviewing its records, INS determined that 55 of these persons were United States citizens, that 45 were not citizens or were probably not citizens, and that no records existed for the remaining 68 persons (*id.* at 80a). Russoniello conveyed this information to the local district attorneys in late May 1982 and again asked that

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(App., *infra,* 79a). This fact confirmed Russoniello's suspicion that registration irregularities were most likely to occur among those who did not speak English (*id.* at 79a & n.1).

[2] Though foreign-born individuals are required to learn English before they may become naturalized citizens (see 8 U.S.C. 1423(1)), the federal law then in effect nevertheless required these particular counties to make available "voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" (42 U.S.C. 1973aa-1a(c)), in Spanish as well as in English (App., *infra,* 3a). The County of San Francisco had to make the materials available in Chinese as well (*ibid.*).

they interview any registrant who had not positively been identified as a United States citizen (*id.* at 5a, 80a). The local district attorneys did so, either by letter or by non-custodial contact (*id.* at 80a-81a). After reviewing the results of these interviews, Russoniello closed his investigation and elected not to pursue any criminal prosecutions (*id.* at 7a-8a, 27a, 44a).

2. On May 12, 1982, however, before Russoniello determined to terminate his inquiry, respondents filed this class action against the principal federal and state officials involved in the voting registration fraud investigation (App., *infra,* 5a). Respondents are (1) a Hispanic-American citizen who was randomly selected for investigation and (2) certain organizations that promote the voting rights of Hispanic and Chinese Americans in the San Francisco Bay area (*ibid.*). Respondents alleged that the investigation "interfered with their statutorily protected right to participate in the electoral process[,] discriminated against them on the basis of race and national origin[,] and deterred the exercise of their First Amendment right to freedom of association" (*id.* at 81a). They prayed that the district court award them injunctive, declaratory, and monetary relief (*id.* at 42a).

On the government's motion, the district court on May 24, 1982 dismissed respondents' prayer for injunctive relief, finding "that, as a matter of law, it ha[d] no jurisdiction to enjoin or otherwise control a preliminary investigation of the U.S. Attorney's office" (App., *infra,* 96a). Then, in ruling on the parties' cross-motions for summary judgment, the court on December 15, 1982 dismissed the remainder of respondents' suit (*id.* at 81a). In an opinion filed later, the court found that "[t]here is nothing in the record to indicate that the[] interviews rose to the level of an involuntary interrogation nor is there any evidence as to any individual being penalized in any way for refusing to cooperate" (*id.* at 80a-81a), that "all of the

information provided by the local defendants and the INS is a matter of public record" (*id.* at 84a), and that, "[f]aced with evidence indicating the possibility of such a substantial impact on the integrity of the franchise, the United States Attorney ha[d] the right, if not the duty, to at least determine the scope of the actual problem and, if necessary, [to] instigate required remedial action" (*id.* at 85a). Thus, the court determined that the "defendants' actions did not violate any clearly established right held by either the individual or group plaintiffs to participate in the electoral process" (*id.* at 88a) and that all defendants, including both petitioners, were entitled to qualified immunity and summary judgment (*id.* at 95a).

3. A divided panel of the Ninth Circuit affirmed (App., *infra,* 41a-75a). After determining that the cessation of the investigation did not render the controversy moot (*id.* at 44a-47a), the court held that, while both the individual and organizational respondents had standing to seek monetary relief, only the organizational respondents had standing to seek equitable relief (*id.* at 47a-54a). As to the individual respondent, the court found that his allegation that the investigation had a "chilling effect" on him did not present a "justiciable claim" (*id.* at 49a), and that any "stigma" he suffered from "public disclosure that the investigation was taking place * * * was self-induced" (*id.* at 50a). As to the organizational respondents, the court found that "their voter registration and educational efforts ha[ve] been hindered as the direct result of the challenged investigation" (*id.* at 51a), that "they are undoubtably the targets of Russoniello's investigation and may be charged with improperly influencing ineligible persons to register" (*id.* at 52a), and, accordingly, that they "raise[d] sufficient claims of potential direct injury to both themselves and their members" to have standing to challenge the investigation (*id.* at 53a).

Nevertheless, the court held that none of the respondents were not entitled to any of the relief being sought (App., *infra,* 54a-69a). The court determined that, while "[t]he district court erred in its ruling that it lacked jurisdiction" to enjoin or otherwise control Russoniello's investigation (*id.* at 54a), "intrusions into the investigative process of a United States Attorney present 'difficult problems of separation of powers' " (*id.* at 55a, quoting *Jett* v. *Casteneda,* 578 F.2d 842, 845 (9th Cir. 1978)), and therefore that "only in extraordinary circumstances [sh]ould [a court] entertain an action to enjoin a prosecutor's investigatory activities" (App., *infra,* 55a). The court found "no [such] extraordinary circumstances * * * suggested" in the summary judgment record of this case (*ibid.*), noting that "a United States Attorney is entitled, indeed required, to conduct an investigation into allegations of voting fraud" (*id.* at 61a), and that the investigation in this case was "reasonably limited in both its scope and its use of classifications" (*ibid.*). On that premise, the court then determined that "the district court's denial of [injunctive and] declaratory relief was not an abuse of discretion" (*id.* at 64a), reasoning that respondents sought "a declaration that the government's activities are unlawful" (*id.* at 63a), and that "the same concerns regarding interference with the activities of prosecuting officials" made both injunctive and declaratory relief improper (*id.* at 64a). Finally, the court determined that neither the individual nor the organizational respondents were entitled to monetary relief (*id.* at 66a-69a), finding that the investigation did "not violate any 'clearly established' rights" (*id.* at 69a) and that "all those sued were entitled at least to qualified, good faith immunity" (*id.* at 68a).[3]

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[3] Judge Nelson dissented (App., *infra,* 69a-75a). While she agreed that "the organizations ha[d] standing" and that the "defendants [were] entitled to good faith immunity from damages" (*id.* at 69a), Judge Nelson disagreed "that [the individual respondent] lack[ed]

4. On petition for rehearing, the court vacated the panel decision and, by a six to five vote, reversed and remanded the case to the district court (App., *infra,* 1a-38a). Like the panel, the en banc majority found that respondents were not entitled to monetary relief (*id.* at 23a-24a), reasoning that respondents' suit "raise[d] issues of first impression" (*id.* at 24a) and that "the government officials did not violate [any] 'clearly established' rights" by the conduct of their investigation (*ibid.*). Moreover, like the panel, the en banc majority determined that the organizational respondents had standing to seek equitable relief (*id.* at 12a-15a), finding that the organizations "are undoubtably the targets of Russoniello's investigation and could be charged with improperly influencing ineligible persons to register" (*id.* at 14a), that "the investigation directly undermined the Organizations' voter education and registration efforts" (*ibid.*), and that "the Organiza-

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standing," "that 'extraordinary circumstances' are required to enjoin an investigation that infringe[d] upon First Amendment rights * * *," or "that declaratory and injunctive relief should be judged under the same standards" (*id.* at 69a-70a). Judge Nelson argued that the individual respondent had standing because "[t]he burden which [he] allege[d] upon his exercise of the franchise—that his request for a bilingual ballot triggered an investigation of him by the INS, the FBI, and the United States Attorney, and an interview with the local District Attorney at which he was to prove his citizenship—[was] concrete" (*id.* at 71a), and because "the majority's suggestion that any stigma * * * was [the individual respondent's] own fault * * * ha[d] neither legal support nor a factual basis in the record" (*id.* at 70a-71a). She then argued that a district court always has equitable authority to enjoin an investigation that lacks a "reasonable basis" (*id.* at 71a-72a), and to issue declaratory relief concerning any unconstitutional action by a government official (*id.* at 72a-73a). Accordingly, Judge Nelson would have remanded the case with instructions that the district court enjoin the investigation "if it lacked a reasonable basis or was initiated in bad faith" (*id.* at 71a) and, in any event, that the district court declare "[t]he investigation * * * unconstitutional under the Equal Protection Clause" (*id.* at 75a).

tions' voter education and registration efforts are unquestionably protected from unwarranted interference by prosecutorial officials" (*ibid.*). Unlike the panel, however, the en banc majority found that the individual respondent had standing to seek equitable as well as monetary relief (*id.* at 11a-12a), reasoning that the individual respondent "was stigmatized as a person who might have registered to vote illegally" (*id.* at 11a) and that "the Government required [him] to prove his citizenship, an affirmative obligation the Government did not place on people who requested English language ballots" (*id.* at 12a).

The en banc majority then turned to respondents' prayers for relief and held that "the district court [had] erred in dismissing the injunctive claims" (App., *infra,* 15a) and in "appl[ying] the good faith immunity standard * * * to * * * bar[] [all] equitable relief" (*id.* at 16a n.8). Without acknowledging that separation of powers places any constraints on the injunctive authority of the federal courts, the en banc majority determined that the district court had jurisdiction to enjoin the investigation and that the case should be remanded so that the district court could determine whether such an injunction should issue (*id.* at 15a). Similarly, without discussing whether the separation of powers places any restrictions on the declaratory authority of the federal courts, the en banc majority examined the merits of respondents' substantive claims and declared that "the voter registration fraud investigation directed toward foreign-born, recently registered voters, requesting bilingual ballots involve[d] a suspect classification" (*id.* at 19a), burdened respondents' "fundamental right" to vote (*id.* at 20a), and "interfered with their constitutional right of association and political expression" (*id.* at 22a).[4] The court then remanded the

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[4] At the same time, the court determined that "[t]here [was] * * * no evidence that by investigating the individual appellants, the Government intended to deny or abridge their right to vote" (App., *infra,*

case with instructions that the district court conduct a trial concerning whether the investigation was conducted by the least "drastic" means available (*id.* at 19a), whether respondents' right to vote was unduly burdened (*id.* at 20a), and whether respondents' First Amendment interests outweighed the government's interest in preventing voter registration fraud (*id.* at 23a).

Judge Wallace, joined by Judges Sneed, Alarcon, and Beezer, dissented (App., *infra,* 25a-36a).[5] Judge Wallace first argued that the individual respondent did not have standing to seek equitable relief, because "[t]here is little reason to believe that the government will again investigate [him] as a possible noncitizen voter" (*id.* at 29a), and because "the investigation in this case involved purely voluntary, noncoercive interviews—with no threat of federal prosecution" (*ibid.*). He then argued that "[t]he majority neglect[ed] to respect the special limitations on our power to enjoin criminal investigations by the executive branch * * *" (*ibid.*). While Judge Wallace agreed with the majority that "separation of powers principle[s] may not mandate judicial inaction where the executive outrageously oversteps limitations on prosecutorial power" (*id.* at 30a), he found "nothing egregious about the prosecutorial conduct in this case" (*id.* at 31a). In particular, he noted that the United States Attorney had focused his investigation on recently-registered, foreign born voters requesting bilingual ballots only "to narrow his inquiries to those persons who may have [had] knowledge of serious criminal activity" (*id.* at 33a); that "considerations of national origin or race are relevant in

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21a). Accordingly, it held that "the district court did not err in granting summary judgment on the Voting Rights Act claims" (*id.* at 22a).

[5] Judge Hug also dissented (App., *infra,* 36a-37a). Because the investigation had ended, he would have dismissed the claims for injunctive and declaratory relief as moot (*id.* at 37a).

many prosecutorial investigations conducted by the executive branch" (*id.* at 35a); that any burden created by the investigation was "a burden that all citizens must be asked to bear when they are potential witnesses to unlawful conduct" (*id.* at 36a); and that neither the review of public records nor the follow-up questioning of potential witnesses "involve[d] any violation of first amendment rights" (*ibid.*). Accordingly, Judge Wallace concluded that the "requirements for equitable relief against a prosecutorial investigation cannot be met on the facts alleged in this case" (*id.* at 31a).[6]

REASONS FOR GRANTING THE PETITION

This case presents questions of profound importance concerning the relationship between the Executive and Judicial Branches. First, it raises the issue whether a federal court has authority under Article III of the Constitution to consider a pre-indictment challenge to the manner and scope of noncoercive, criminal investigative activities by a United States Attorney. If the Court should conclude that some such authority exists, the case raises a second issue concerning the circumstances in which a federal court may exercise that authority and whether those circumstances exist in this case. Because of the recurrent nature of those issues and their critical significance to

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[6] Judge Sneed added a separate word "to underscore Judge Wallace's dissent" (App., *infra,* 37a-38a). Judge Sneed emphasized that the fact "[t]hat Hispanics and Chinese make up th[e] pool [Russoniello investigated is] the consequence of geography, history, and the Voting Rights Act, not the discriminatory bias that the majority ascribes to the fact" (*id.* at 38a). Judge Sneed found that "[t]he classification employed by the United States Attorney was crafted to discover fraudulent voting. It was 'for all practical purposes' nothing more" (*ibid.*).

both general principles of separation of powers and the effective operation of the federal criminal justice system, this Court's review is warranted.

1. In our view, the district court was without authority to adjudicate either respondents' equitable or monetary prayers for relief in this case, because none of the challenged acts involved the sort of mature, coercive governmental action that is subject to judicial review under this Court's decisions. Rather, those prayers asked the district court to review a United States Attorney's initiation and conduct of a criminal investigation by wholly noncoercive means, actions which are nonjusticiable under Article III of the Constitution.

a. Article III of the Constitution does not grant the federal courts "an unconditioned authority to determine the constitutionality of legislative or executive acts" (*Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982)). Rather, Article III limits the "judicial power" of the United States to the resolution of "cases" and "controversies." U.S. Const. Art. III, § 2. "The 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded" (*Allen* v. *Wright*, 468 U.S. 737, 750 (1984)). It thus acknowledges that certain questions about government are committed to the other Branches (see *Powell* v. *McCormack*, 395 U.S. 486, 516-549 (1969)) and thereby states "fundamental limits on [the] federal judicial power in our system of government" (*Allen* v. *Wright*, 468 U.S. at 750).

As an incident to the elaboration of this bedrock requirement for judicial review, litigants must show that the matters they seek to have adjudicated by the federal courts are judicially cognizable. The doctrines of " 'standing[,] * * * mootness, ripeness, political question, and the like—relate in part, and in different though overlapping

ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government' " (*Allen* v. *Wright,* 468 U.S. at 750, quoting *Vander Jagt* v. *O'Neill,* 699 F.2d 1166, 1178-1179 (D.C. Cir. 1983) (Bork, J., concurring)). This Court has held, for example, that litigants may not invoke the authority of a federal court unless they have suffered a "judicially cognizable injury." See *Allen* v. *Wright,* 468 U.S. at 752, 753-756; *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 619 (1973). Likewise, it has held "that an essential prerequisite to [the] assertion [of a constitutional right] is a final and authoritative" governmental action; "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes" (*McDonald, Sommer & Frates* v. *County of Yolo,* No. 84-2015 (June 25, 1986), slip op. 7). And the Court has concluded that certain questions—so-called "political questions"—may not be adjudicated by federal courts at all; they simply "lie[] beyond judicial cognizance" (*Baker* v. *Carr,* 369 U.S. 186, 217 (1962)). See *Coleman* v. *Miller,* 307 U.S. 433 (1939); *Oetjen* v. *Central Leather Co.,* 246 U.S. 297 (1918). By such doctrines, federal courts are "confine[d] * * * to a role consistent with a system of separated powers and [to disputes] which are traditionally thought to be capable of resolution through the judicial process" (*Flast* v. *Cohen,* 392 U.S. 83, 97 (1968)). See generally *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.,* 454 U.S. at 472-473; *Baker* v. *Carr,* 369 U.S. at 217-226.

These limitations on judicial power have substantial bearing on the relationship between the Judicial and Executive branches in the exercise of the prosecutorial function. Article II of the Constitution vests the Executive Branch with the exclusive authority to "take Care that the

Laws be faithfully executed." See U.S. Const. Art. II, § 3. This delegation includes the function of the criminal prosecutor and, while much of what the prosecutor does may ultimately be challenged in the course of any proceeding that he initiates, his decisions whether, when, and what sort of cases to initiate accordingly have not been subject to review prior to the bringing of charges. See *United States* v. *Batchelder,* 442 U.S. 114, 124 (1979) ("whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion"); *Bordenkircher* v. *Hayes,* 434 U.S. 357, 364 (1978) (assuming probable cause, decision whether and what to charge "rests entirely in [the prosecutor's] discretion"); *United States* v. *Nixon,* 418 U.S. 683, 693 (1974) ("Executive Branch has exclusive and absolute discretion to decide whether to prosecute a case"); *United States* v. *Thompson,* 251 U.S. 407 (1920) (court order quashing indictment for failure to obtain permission of court to resubmit to grand jury invades functions of the United States Attorney and the grand jury); *Confiscation Cases,* 74 U.S. (7 Wall.) 454, 457 (1868) ("Public prosecutions, until they come before the court to which they are returnable, are within the exclusive discretion of the district attorney").

The "decision to prosecute is particularly ill-suited for judicial review"; "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake" (*Wayte* v. *United States,* 470 U.S. 598, 607 (1985)). See also *Heckler* v. *Chaney,* 470 U.S. 821, 831-832 (1985) ("the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement"); *Newman* v. *United States,* 382 F.2d 479, 480 (D.C. Cir. 1967) ("Few subjects are less adapted to

judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought"). For these reasons, the courts have found that private citizens ordinarily lack a judicially cognizable interest in the process employed and decisions reached by the Executive Branch concerning the filing of criminal charges. See *Leeke* v. *Timmerman,* 454 U.S. 83, 86-87 (1981); *Linda R.S.* v. *Richard D.,* 410 U.S. at 619.

b. To be sure, once a prosecution is initiated, it is subject to challenge in the ensuing criminal proceeding on a variety of grounds, including the motivations of the prosecutor in bringing it. See *Wayte* v. *United States,* 470 U.S. at 608; *Bordenkircher* v. *Hayes,* 434 U.S. at 364; *Blackledge* v. *Perry,* 417 U.S. 21, 28 (1974). And, even during the investigative phase, certain exercises of governmental power which are "regulatory, proscriptive, or compulsory in nature" may be challenged in court (*Laird* v. *Tatum,* 408 U.S. 1, 11 (1972)). Article III does not, for example, prevent a federal court from reviewing claims that an unreasonable "search" or "seizure" of persons or things has occurred (see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971)), or that subpoenaed material should not be produced (see *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 208 (1946); cf. *Branzburg* v. *Hayes,* 408 U.S. 665, 707-708 (1972) (prosecutor may not use grand jury and its subpoena powers as instrument of oppression)). What may not be challenged, though, are the noncoercive information-gathering and deliberative aspects of the investigative process, up to and including the decision to seek a formal charge. In analogous contexts, this Court has made this point explicit.

In *Laird* v. *Tatum,* 408 U.S. 1 (1972), the Court identified the question presented as "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose" (408 U.S. at 10). The Court answered that question in the negative, reasoning that the Department of Army's investigative and data-gathering activities in that case were not "regulatory, proscriptive, or compulsory in nature" (*id.* at 11), and that private citizens are not entitled " 'to invoke the judicial power to determine the validity of executive * * * action' " in such circumstances (*id.* at 13, quoting *Ex parte Levitt,* 302 U.S. 633, 634 (1937)).

Similarly, in *FTC* v. *Standard Oil Co.,* 449 U.S. 232 (1980), a case arising under the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701 *et seq.*, the Court held that the Federal Trade Commission's issuance of a complaint that it had "reason to believe" that several major oil companies were violating Section 5 of the Federal Trade Commission Act was not "final agency action" subject to judicial review. The Court reasoned that "the Commission's averment of 'reason to believe' * * * [was] not a definitive statement of position" (449 U.S. at 241), but rather "a threshold determination that further inquiry is warranted" (*ibid.*), and that, since this determination has no "legal or practical effect" except to impose a "burden of responding to the charges made against it" (*id.* at 242), judicial review would be premature, an "interference with the proper functioning of the agency and a burden for the courts" (*ibid.*). See also *McDonald, Sommer & Frates* v. *County of Yolo,* slip op. 7-12.

The Court's requirement in these cases of mature, coercive governmental action as a prerequisite to judicial review ultimately devolves from the separation of powers principles that underlie the "case or controversy" requirement in Article III. When the Executive Branch "does not exercise its *coercive* power over an individual's liberty or property rights," it "does not infringe upon areas that courts often are called upon to protect" (*Heckler* v. *Chaney*, 470 U.S. at 832) (emphasis in original). Thus, judicial review of such Executive Branch activities "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action" (*Laird* v. *Tatum*, 408 U.S. at 15). The constitutional separation of powers precludes courts from assuming this role. See *Allen* v. *Wright*, 468 U.S. at 760, quoting *Los Angeles* v. *Lyons*, 461 U.S. 95, 112 (1983) (" '[a] federal court * * * is not the proper forum to press' general complaints about the way in which government goes about its business"); *Nathan* v. *Smith*, 737 F.2d 1069, 1077 (D.C. Cir. 1984) (Bork, J., concurring) (any attempt by the courts to "control the law enforcement decisions of the Attorney General * * * would raise serious constitutional questions relating to the separation of powers"); *Reporters Committee for the Freedom of the Press* v. *American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979) ("[t]he balance between the Executive and Judicial branches would be profoundly upset if the Judiciary assumed superintendence over the law enforcement activities of the Executive Branch * * *"); *LaRouche* v. *Webster*, 566 F. Supp. 415, 418 (S.D.N.Y. 1983) ("it is not the function of the courts to review the wisdom of the prosecutor's decision to investigate, or to inquire into the prosecutor's motives"); see also *Jett* v. *Casteneda*, 578 F.2d 842, 845 (9th Cir. 1978).[7]

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[7] The Court has similarly held that the federal courts may not "saddle a grand jury with minitrials and preliminary showings" concerning

its investigation of possible criminal activity (*United States* v. *Dionisio*, 410 U.S. 1, 17 (1973)). The Constitution vests the grand jury with responsibility for determining "whether there is probable cause to believe a crime has been committed and [for] * * * protect[ing] * * * citizens against unfounded criminal prosecutions" (*United States* v. *Calandra*, 414 U.S. 338, 343 (1974)). To allow it to fulfill that function, the grand jury has "wide latitude to inquire into violations of criminal law" and to "determine alone the course of its inquiry" (*id.* at 343). Grand jurors "may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge" (*United States* v. *Dionisio*, 410 U.S. at 15), and "[a] sufficient basis for an indictment may only emerge at the end of the investigation when all the evidence has been received" (*id.* at 15-16). See also *Costello* v. *United States*, 350 U.S. 359, 362 (1956). Therefore, this Court has held that private citizens generally may not object to the competency, relevancy, or constitutionality of the evidence that a grand jury considers (see *id.* at 344-345, 353-355), challenge the basis on which a grand jury has initiated an investigation (see *United States* v. *Dionisio*, 410 U.S. at 13-17), or "set limits to the investigation that the grand jury may conduct" (*Blair* v. *United States*, 250 U.S. 273, 282 (1919)). The Court has held that private citizens may challenge only the coercive aspects of a grand jury's investigation (as that coercion applies to the persons affected). See *United States* v. *Dionisio*, 410 U.S. at 11-12, 16-18; *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906); see also *Branzburg* v. *Hayes*, 408 U.S. at 707-708.

Importantly, " '[t]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury' " (*Butz* v. *Economou*, 438 U.S. 478, 510 (1978), quoting *Yaselli* v. *Goff*, 12 F.2d 396, 404 (2d Cir. 1926) (citation omitted)). Like the grand jury, the prosecutor does not and cannot make decisions to prosecute "in a vacuum" (*Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981)); rather, like the grand jury, the prosecutor ordinarily must conduct a preliminary investigation to determine whether charges should be filed. See *United States* v. *Goodwin*, 457 U.S. 368, 382 n.14 (1982); *Cook* v. *Houston Post*, 616 F.2d 791, 793 (5th Cir. 1980). Indeed, though "the grand jury may itself decide to investigate a matter or to seek certain evidence, it depends largely on the prosecutor's office to secure the evidence or witnesses it requires" (*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983)). In obtaining this material for the grand jury, the prosecutor does not conduct "an

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c. In this case, it is quite clear that neither Russoniello nor any of the other government officials involved in the investigation subjected respondents to any coercive investigatory or prosecutorial action. They did not seek a warrant or otherwise conduct any search or seizure of respondents' persons or premises, compel respondents to provide information by subpoena or custodial interrogation, or file any indictments or criminal charges.[8] Rather, Russoniello requested that the voter registrars of the nine counties randomly select from public records and submit to him the names of 25 recently-registered foreign born voters who had requested bilingual ballots; INS then verified the citizenship status of the names submitted to Russoniello; and, on receiving INS's report from Russoniello, the district attorneys conducted noncustodial interviews of any individuals whom INS was unable positively to identify as citizens. As the district court noted, "all of the information provided by the local defendants and INS [was] a matter of public record" (App., *infra*, 84a); "[t]here is nothing in the record to indicate

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"an adversary hearing in which the guilt or innocence of the accused is adjudicated" (*United States* v. *Calandra*, 414 U.S. at 343). Rather, like the grand jury, the prosecutor conducts "an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person" (*id.* at 343-344). Thus, in the absence of coercive activity, the prosecutor also "must be free to pursue [his] investigation unhindered by external influence or supervision * * *" (*United States* v. *Dionisio*, 410 U.S. at 17).

[8] Russoniello did suggest in his letter to the district attorneys that he would seriously "consider" prosecuting any group or individual who had deliberately conspired to register unqualified voters. See App., *infra*, 43a. But Russoniello made this suggestion without knowing the identities of respondents (or the identities of any other person whom he could prosecute). Thus, he did nothing more than make an impersonal statement that, if he discovered that federal law was being violated, he would enforce the federal law.

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that the[] interviews rose to the level of an involuntary interrogation" (*id.* at 80a-81a); "nor is there any evidence as to any individual being penalized in any way for refusing to cooperate" (*id.* at 81a). In short, there is no basis for suggesting that any aspect of this investigation was coercive or that government officials were doing anything other than conducting a preliminary inquiry concerning whether a fuller grand jury investigation or criminal prosecution might be warranted. Accordingly, the district court should have been held without authority to review the manner and scope of these government officials' investigative actions.

d. Respondents' allegation of "chilling effect" resulting from the investigation does not render their claims justiciable. See *Laird* v. *Tatum*, 408 U.S. at 13-15. Nor does their allegation of "stigma" make those claims judicially cognizable. See *Allen* v. *Wright*, 468 U.S. at 753-756. Rather, just as "the expense and annoyance of litigation is 'part of the social burden of living under government' " (*Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938) (citation omitted)), so too is the expense and annoyance of being identified as a witness or suspect in connection with possible criminal activity a price of living in a society committed to law enforcement. See *FTC* v. *Standard Oil Co.*, 449 U.S. at 244; *Laird* v. *Tatum*, 408 U.S. at 11-15; *Younger* v. *Harris*, 401 U.S. 37, 46-47 (1971); *Jones* v. *Unknown Agents of the Federal Election Comm'n*, 613 F.2d 864, 877-878 (D.C. Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *LaRouche* v. *Webster*, 566 F. Supp. 415, 418 (S.D.N.Y. 1983). In the absence of governmental action that is "regulatory, proscriptive, or compulsory in nature," allegations of "chill" and "stigma" are simply inadequate to make governmental action judicially reviewable.

The court of appeals' contrary judgment spells great mischief for the orderly administration of law by both the Executive and Judicial Branches. Authorizing federal courts to review the noncoercive aspects of criminal investigations will allow resourceful and obstreperous litigants to divert the courts' and the prosecutors' "energy and attention * * * from the pressing duty of enforcing the criminal law" (*Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976)). Moreover, anticipatory judicial intervention into the investigatory process will deny prosecutors an opportunity to correct their own mistakes and lead to piecemeal review (*FTC* v. *Standard Oil Co.*, 449 U.S. at 243), "delay[] the criminal proceeding, threaten[] to chill law enforcement by subjecting the prosecutor[s'] motives and decisionmaking to outside inquiry, and * * * undermine prosecutorial effectiveness by revealing the Government's enforcement policy" (*Wayte* v. *United States*, 470 U.S. at 607). Indeed, allowing such challenges will create an incentive for prosecutors to forgo particular investigations and certain sources of evidence, to resort to the grand jury to investigate possible criminal activity (rather than use the less intrusive means available to prosecutors' offices), and, if necessary, to pursue prosecutions without having fully investigated all circumstances surrounding a case. See generally *Butz* v. *Economou*, 438 U.S. 478, 509-517 (1978); *United States* v. *Lovasco*, 431 U.S. 783, 792-796 (1977); *Imbler* v. *Pachtman*, 424 U.S. at 424-431. This Court's immediate intervention is necessary to preserve "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system" (*id.* at 427-428).

2. While we submit that there can be no occasion justifying pre-indictment judicial review of investigative activities by a United States Attorney that are not "regulatory, proscriptive, or compulsory in nature," should the Court disagree on that point, there remains a

substantial question concerning whether such review was justified in the circumstances presented here. The court of appeals held that, although the government officials had a legitimate investigatory purpose and did not violate any clearly established rights, a remand was necessary so that the district court could (1) reassess whether injunctive relief should issue and (2) hold a trial concerning whether Russoniello's investigation was conducted by the least restrictive means available, whether the investigation unduly burdened respondents' fundamental right to vote, and whether the government's interest in preventing voter registration fraud outweighed respondents' First Amendment rights. This holding grossly departs from settled principles of equity jurisprudence and constitutes an unwarranted and unprecedented interference with the prosecutorial activities of the Executive Branch.

a. The Constitution's clear delegation of authority to the Executive Branch to conduct investigations and to present criminal charges is complemented by the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief" (*Younger* v. *Harris*, 401 U.S. 37, 43-44 (1971)). This doctrine "prevent[s] erosion of the role of the jury and avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted" (*id.* at 44). Thus, this Court has long held that "in the absence of exceptional circumstances creating a threat of irreparable injury 'both great and immediate,' a federal court must not intervene by way of either injunction or declaratory judgment" in an ongoing state criminal prosecution (*Kugler* v. *Helfant*, 421 U.S. 117, 123 (1975)). See also *Perez* v. *Ledesma*, 401 U.S. 82, 85 (1971) (equitable relief against state prosecutions is

available "[o]nly in cases of proven harassment or prosecution undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances").

While this limitation on the equity power has been repeatedly articulated in cases dealing with the authority of federal courts to intervene in pending state criminal cases (see, *e.g.*, *Trainor* v. *Hernandez*, 431 U.S. 434, 446-447 (1977); *Kugler* v. *Helfant*, 421 U.S. at 123-125; *Younger* v. *Harris*, 401 U.S. at 43-44; *Dombrowski* v. *Pfister*, 380 U.S. 479, 482 (1965)), or to oversee state law enforcement practices (see, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 112 (1983); *Rizzo* v. *Goode*, 423 U.S. 362, 379 (1976)), no lesser restriction on judicial power can apply where noncoercive federal criminal investigative activities are concerned. Such governmental activities are almost always less directly intrusive on the interests of those on whom the investigation touches than is a pending prosecution where charges have been filed. Moreover, the separation of powers concern to protect the United States Attorney's investigative authority, like the federalism concern at work in *Younger* and *Lyons*,[9] imposes an additional limiting factor on the equitable discretion of the federal courts. See *Allen* v. *Wright*, 468 U.S. at 760, quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 499 (1974)

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[9] The Court has held that federal court interference with state criminal prosecutions is generally inconsistent with notions of "comity" and "our Federalism" (*Younger* v. *Harris*, 401 U.S. at 44). In so holding, however, the Court has made clear that principles of comity and federalism only "reinforce[]" the "underlying reason" for judicial restraint, to wit, the "basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief" (*id.* at 43, 44).

("[c]ase or controversy considerations * * * 'obviously shade into those determining whether the complaint states a sound basis for equitable relief' ").

For these reasons, with the exception of the court below, the lower federal courts have uniformly accorded federal criminal investigations no less protection from judicial scrutiny than *Younger* accorded state criminal prosecutions. Those courts have thus held that such investigative activities may be enjoined or declared unconstitutional only in the most extraordinary circumstances. See, *e.g., Reporters Committee for Freedom of the Press* v. *American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978); *Jett* v. *Casteneda*, 578 F.2d 842, 845 (9th Cir. 1978); *LaRouche* v. *Webster*, 566 F. Supp. 415, 417 (S.D.N.Y. 1983); see also *In re Grand Jury of the Southern District*, 508 F. Supp. 1210, 1214 (S.D. Ala. 1980); *Pollard* v. *Roberts*, 283 F. Supp. 248, 257 (E.D. Ark.), aff'd, 393 U.S. 14 (1968); *In re Grand Jury Subpoena to Central States*, 225 F. Supp. 923, 925 (N.D. Ill. 1964).

b. Assuming that the sort of "extraordinary circumstances" required by the *Younger* line of cases will justify equitable intervention in federal criminal investigations by United States Attorneys, it is nevertheless clear that no such extraordinary circumstances exist here. Respondents simply have not alleged or proved either the "great and immediate" irreparable injury or the "bad faith," "proven harassment," or flagrant and patent violation of express constitutional prohibitions or other extreme circumstances that are prerequisite to anticipatory judicial intervention in even coercive prosecutorial activity. See *Younger* v. *Harris*, 401 U.S. at 46, 53, 54; see also *City of Los Angeles* v. *Lyons*, 461 U.S. at 112.

The alleged injuries in this case simply are not "great and immediate" within the meaning of the *Younger* line of cases. See *Younger* v. *Harris*, 401 U.S. at 46. As Judge

Wallace noted in the dissent (App., *infra*, 29a), "the result of the investigation was to demonstrate that [the individual respondent] is a citizen, legally registered to vote, [and] there is little reason to believe that the government will again investigate [him] as a possible noncitizen voter." Thus, the individual respondent has no basis at all for seeking prospective relief. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-106, 111; *O'Shea* v. *Littleton*, 414 U.S. at 499-504. We likewise doubt that the injuries alleged by the organizations are sufficient to provide them with standing, since they allege "chilling effects" from an investigation that never specifically focused on them or subjected them to a reasonable threat of prosecution. See *Laird* v. *Tatum*, 408 U.S. at 13-14; *Boyle* v. *Landry*, 401 U.S. 77, 80-81 (1971). But even if these "chilling effects" are sufficient to provide the organizations with standing, they are not " 'irreparable' in the special legal sense of that term" (*Younger* v. *Harris*, 401 U.S. at 46). Rather, such "chilling effects" are reparable by the termination of the investigation (as in this case), or by the successful defense of any prosecution that results. See *FTC* v. *Standard Oil Co.*, 449 U.S. at 244-245; *Younger* v. *Harris*, 401 U.S. at 46-47.

Moreover, the governmental action challenged in this case was not conducted in bad faith, for the purpose of harassing respondents, or in flagrant disregard of respondents' rights. The undisputed facts show that Russoniello learned through public sources of allegations that various persons or organizations may have been conspiring fraudulently to register unqualified voters. It was certainly proper and perhaps obligatory that he institute some further inquiry. In doing so and in attempting to enforce the law against registration of noncitizens, Russoniello naturally focused on registrants' foreign birth, recent registration and request for bilingual voting materials. These three pieces of information were readily available on the voter registration form and were an ob-

vious means of focusing the "investigation on persons who had registered at a time that illegal registrations may have been rampant and who, if they were witnesses to criminal activity, would be more likely to recollect details than would be long-registered noncitizen voters" (App., *infra*, 33a-34a). In short, Russoniello framed his investigation carefully to identify persons "who [might] have knowledge of serious criminal activity" (*id.* at 33a). Indeed, since Russoniello terminated the investigation when it failed to produce sufficient evidence to warrant a fuller grand jury investigation or criminal prosecution (*id.* at 45a), the record not only fails to establish prosecutorial misconduct for which there is "an extraordinarily pressing need for immediate federal equitable relief" (*Kugler* v. *Helfant*, 421 U.S. at 125), it shows that there is no continuing prosecutorial conduct at all.

That the investigation in some sense "targeted" persons of Chinese-American and Hispanic-American origin does not justify anticipatory judicial intervention. The Equal Protection Clause does not require prosecutors to turn a blind eye to basic descriptive facts relevant to suspected criminal conduct. This Court has therefore recognized that law enforcement officials may consider group characteristics and statistical profiles, including the national origin or race of suspects and witnesses, in narrowing their investigations. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975); *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986) (Stevens, J., dissenting), slip op. 2-4. Here, "recently-registered voters from the Chinese-American and Hispanic-American communities were most likely to be able to furnish [Russoniello] with valuable information for the criminal investigation of a pattern of illegal voter registration he had reason to believe was occurring in those communities" (*id.* at 34a-35a). Thus, it was entirely proper for Russoniello to seek information from and concerning them.

Even the opinion of the court below makes clear that the government officials involved in this investigation did not engage in the sort of bad faith, harassment, or other extreme behavior that arguably would establish the "extraordinary circumstances" necessary for enjoining a prosecutor's activities.[10] The court below found that "the government had a compelling interest in preventing voter registration fraud" (App., *infra*, 19a), that there was no evidence that the government intended to deny or abridge respondents' right to vote (*id.* at 21a), that respondents' suit "raise[d] issues of first impression" (*id.* at 24a), and that "the government officials did not violate [any] 'clearly established' rights" by the conduct of their investigation (*ibid.*). In short, the court conceded that Russoniello's investigation was not conducted for purposes of harassment, did not violate any clearly established rights, and had not been shown to be devoid of legitimate investigatory purpose. Accordingly, the court should have held that the requisite "extraordinary circumstances" were absent and that neither injunctive nor declaratory relief could issue in this case.

c. The contrary conclusion of the court below has unfortunate and far-reaching implications for the future relationship between federal prosecutors and the courts. Without any discussion of separation of powers con-

[10] As noted above, this Court has held that the "extraordinary circumstances" standard applies to prayers for declaratory as well as for injunctive relief. See *Kugler* v. *Helfant*, 421 U.S. at 123-124; *Samuels* v. *Mackell*, 401 U.S. 66, 72 (1971). See also *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 930-931 (1975). Thus, while it is true that there are some cases in which declaratory but not injunctive relief may be granted (see *Steffel* v. *Thompson*, 415 U.S. 452, 466-473 (1974)), this clearly is not such a case. As Judge Wallace noted in his original panel opinion, respondents are not "seeking a declaration that * * * [their] voter registration activities are lawful. Rather, they seek a declaration that the government's activities are unlawful. * * * In these circumstances, * * * [d]eclaratory relief * * * would raise the same concerns regarding interference with the activities of prosecuting officials [as the issuance of injunctive relief would raise]" (App., *infra*, 63a-64a).

straints, the court has remanded with instructions that the district court reassess whether injunctive relief should issue and, in any event, hold a trial concerning whether Russoniello's investigation was conducted by the least restrictive means available, whether the investigation unduly burdened respondents' fundamental right to vote, and whether the government's interest in preventing voter registration fraud outweighed respondents' First Amendment interests. As noted earlier, this judgement invites litigants to use the courts to disrupt ongoing criminal investigations, precludes federal prosecutors from successfully defending even insubstantial claims (like those involved in this case) by motions for summary judgment, threatens to chill legitimate prosecutorial activity, and places the federal courts in the position of supervising activities that the Constitution places in the exclusive discretion of the Executive Branch. This Court's review is clearly warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1987

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 82-4427, 83-2581

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS-APPELLEES.

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS, CHINESE FOR AFFIRMATIVE ACTION, AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; O'MALLEY, WILLIAM A., INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY: UNDERWOOD, LON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; SMITH, ARLO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY, ET AL., DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Northern District of California.

Argued and Submitted April 29, 1986

Decided Aug. 26, 1986

Before BROWNING, Chief Judge, and WALLACE, SNEED, HUG, TANG, SKOPIL, SCHROEDER, PREGERSON, ALARCON, FERGUSON, and BEEZER, Circuit Judges.

PREGERSON, Circuit Judge.

Jose Olagues and various organizations promoting the voting rights of Chinese Americans and Hispanic Americans in the San Francisco Bay area filed a class action suit against the United States Attorney for the Northern District of California and various other government officials for damages, and declaratory and injunctive relief. Olagues and the organizations allege that a voter registration fraud investigation conducted by the United States Attorney violated the Voting Rights Act and the first, fifth, fourteenth, and fifteen amendments to the United States Constitution.

The district court dismissed the injunctive claims on the ground that it lacked jurisdiction to enjoin an investigtion by a United States Attorney. Subsequently, the court granted summary judgment in favor of the United States Attorney and the other government officials on the remaining declaratory judgment and damage claims.

The appellants contend, *inter alia*, that the district court erred in dismissing their injunctive relief claim and in granting summary judgment for the government officials on the appellants' claims for damages and declaratory relief.

We affirm in part and reverse in part.

BACKGROUND

On April 19, 1982, three weeks before the voter registration deadline for the 1982 California primary election, the United States Attorney for the Northern District of

California, Joseph P. Russoniello, commenced an investigation of foreign-born voters who requested bilingual ballots in nine San Francisco Bay Area counties.[1] In all nine counties affected by the investigation, voting materials were available pursuant to federal law in both Spanish and English. *See* 42 U.S.C. § 1973aa-1a. In San Francisco County, they were also available in Chinese.

Russoniello sent a letter requesting the district attorneys of each of the nine counties to send him the names of twenty-five randomly selected recently registered, foreign-born voters who requested bilingual ballots so that the Immigration and Naturalization Service (INS) could verify the citizenship status of those individuals. The letter stated that further investigation would be undertaken of those not positively identified as United States citizens. In addition, the letter stated that although Russoniello did not intend to prosecute ineligible registered voters under federal law, country officials could prosecute them under the California Elections Code. Russoniello's letter also stated that he would seriously consider prosecuting any group or individual who fraudulently registered the ineligible voters.

The impetus for the secret investigation came from Russoniello's review of two reports prepared by Santa Clara County's District Attorney that summarized an investigation of foreign-born voters in Santa Clara County. The investigation focused on all foreign-born voters in the Fifth District of the City of San Jose and uncovered some cases where non-citizens had been registered to vote.

In stating his reasons for targeting only Spanish-speaking and Chinese-speaking foreign-born voters,

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[1] The counties were Alameda, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz, Contra Costa, and Sonoma.

Russoniello referred to voter registration drives recently undertaken to register those voters and the fact that the Spanish language voter registration materials did not accurately translate the requirement that a voter must be a citizen.[2] Russoniello believed that individuals who requested bilingual ballots were more susceptible to being confused or misled about voter eligibility. He was concerned that if there was widespread illegal registration, the upcoming elections would be subject to challenge.

All of the district attorneys and registrars of voters of the nine counties cooperated and sent the names Russoniello had requested. Olagues and others in the plaintiff class were among the persons investigated.[3]

When information concerning the investigation became public, a variety of individuals expressed concern that the timing of the investigation and its focus on particular racial groups would have an intimidating effect on their right to vote.[4] Despite these concerns Russoniello persisted in the investigation.

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[2] No problems with Chinese voting materials were noted.

[3] As a naturalized citizen Olagues is required to read, write, and speak English. Despite his English literacy he chose to use a bilingual ballot because he was running for an office and wanted to see how his campaign statement was translated in Spanish.

Lilia Medina, a naturalized citizen, was also investigated. When the INS could not verify her citizenship status, Russoniello requested the FBI to have her prove she was a United States citizen.

Another citizen who was investigated was Maria Gloria Rodriguez. A United States citizen since 1967, she worked with the League of Women Voters and was a deputy registrar of voters.

[4] For example, March Fong Eu, Secretary of State for California, wrote to Russoniello expressing concern that the investigation might have a chilling effect on bilingual voter's right to vote and that to single out voters of Hispanic and Chinese heritage for this registration fraud investigation raised serious questions of law and policy.

On May 12, 1982, appellants Jose Olagues, the Hispanic Coalition for Human Rights, Chinese for Affirmative Action, and San Francisco Latino Voter Registration Education Project (the "Organizations") filed this class action on behalf of naturalized citizens who use Spanish or Chinese language voting materials. Their complaint alleges that United States Attorney Russoniello, the nine County District Attorneys, the nine County Registrars of Voters, and INS District Director David Ilchirt (collectively the "Government") violated their civil and constitutional rights under the Voting Rights Act, and the first, fifth, fourteenth, and fifteenth amendments to the United States Constitution.

The appellants first sought to enjoin the investigation. Their declarations filed with the district court not only indicated how the investigation would adversely affect Chinese-speaking and Spanish-speaking voters, but also disclosed that the registration rate had already declined markedly in what would ordinarily have been the most successful weeks of the voter registration drive. The district court dismissed the claim for injunctive relief, holding that it lacked subject matter jurisdiction. The appellant timely appealed.

On May 26, 1982, Russoniello again wrote to the district attorneys of the nine counties concerning the investigation. He asked them to interview 113 persons that the INS could not identify as citizens. The district attorneys complied with his request. The interviews were conducted in person and by mail. Individuals who did not have proof of citizenship were asked to disclose the name of the person or the organization who had registered them.

On September 24, 1982, the Government moved for summary judgment or, in the alternative, for dismissal of the appellant's complaint and on November 30, 1982, the appellants moved for partial summary judgment. The

district court granted the Government's motion for summary judgment on the declaratory relief claims, and Olagues and the Organizations timely appealed.

This is a consolidated appeal from two district court decisions. The first appeal, No. 82-4427, is from the district court's decision on May 24, 1982, dismissing that part of plaintiff's complaint seeking injunctive relief against federal defendants. The second appeal, No. 83-2581, is from the district court's judgment and final order on September 15, 1983, granting the Government's motion for summary judgment and denying the appellants' motion for partial summary judgment.

A divided panel of this court affirmed the district court. *Olagues v. Russoniello*, 770 F.2d 791, 806 (9th Cir.1985), *withdrawn for rehearing en banc*, Nos. 82-4427 & 83-2581, unpublished order (9th Cir. Jan. 21, 1986). We took this case *en banc* because it raises important voting rights and constitutional issues relating to foreign-born, recently registered voters who request bilingual ballots.

DISCUSSION

I. ARTICLE III JUSTICIABILITY

"Article III of the Constitution limits the power of federal courts to deciding 'cases' and 'controversies.' " *Diamond v. Charles*, ____ U.S. ____, ____, 106 S.Ct. 1697, 1702, 90 L.Ed.2d 48 (1986). Before we can reach the merits of this appeal, there are two jurisdictional issues we must address. First, we must decide whether the case is moot because Russoniello has terminated the investigation. Then we must decide whether any of the appellants have standing to assert the claims at issue in this case.

A. *Mootness*

There is no question that a case or controversy remains with respect to the damage claim. However, because Russoniello terminated the investigation, we must deter-

mine whether there remains a live case or controversy with respect to the equitable relief claim.

By itself, past exposure to illegal conduct is insufficient to establish a present case or controversy necessary to support a claim for equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 495, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). Claims for declaratory and injunctive relief therefore become moot when the challenged activity ceases if subsequent events show that the activity "could not reasonably be expected to recur," *Chinese for Affirmative Action v. Leguennec,* 580 F.2d 1006, 1009 (9th Cir.1978), *cert. denied,* 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979), unless there is a possibility of "continuing, present adverse effects," *O'Shea* 414 U.S. at 496, 94 S.Ct. at 676; *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 1664, 75 L.Ed.2d 675 (1983) (six-month moratorium does not make case moot because the moratorium is not permanent and intervening events have not irrevocably eradicated the effects of the alleged violation).

In the instant case, there is a possibility of continuing adverse effects. The Organizations argue that their efforts have been hobbled because of the fear engendered in Chinese-speaking and Spanish-speaking foreign-born citizens by the challenged investigation. The Organizations assert that the voter fraud investigation intimidated Chinese-speaking and Spanish-speaking citizens from registering to vote or requesting bilingual ballots because of fear that they would become targets of the investigation. These individuals are new to this country. Thus they are understandably insecure in exercising their recently acquired rights as citizens, and easily intimidated by government action.

The termination of Russoniello's investigation is not irrevocable. Therefore, unless we determine the legality of a voter fraud investigation that focuses on foreign-born

voters requesting bilingual ballots, the Organizations' registration drives may continue to suffer from the chilling effects of the investigation despite its termination.

Moreover, a live case or controversy for purposes of Article III may also remain even after the challenged activity ceases if the Government's actions are capable of repetition, yet evading review. *See, e.g., Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122, 94 S.Ct. 1694, 1698, 40 L.Ed.2d 1 (1974); *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir.1985). The capable-of-repetition doctrine is limited to extraordinary cases where: (1) the duration of the challenged action is too short to be fully litigated before it ceases; and (2) there is a reasonable expectation that the plaintiffs will be subjected to the same action again. *Wiggins v. Rushen*, 760 F.2d 1009, 1011 (9th Cir.1985).

The first requirement is clearly met here. Voter registration investigations, such as the one conducted in the present case, may be of short duration, making them effectively capable of evading review by an appellate court. *See, e.g., Nebraska Press Association v. Stuart*, 427 U.S. 539, 546-47, 96 S.Ct.2791, 2796-97, 49 L.Ed.2d 683 (1976).

To satify the second requirement, the plaintiff must make a reasonable showing that he will again be subject to the challenged activity. *E.g., Lyons*, 461 U.S. at 109, 103 S.Ct. at 1669; *United States v. Max*, 779 F.2d 1415, 1416 (9th Cir.1986) (per curiam). Russoniello did not voluntarily cease the challenged activity because he felt that the investigation was in any way improper. Rather, he terminated the investigation solely because it failed to produce evidence supporting any further investigative efforts. Russoniello has at all times maintained that his actions were proper. A government official's voluntary cessation of the challenged activity is insufficient to render a case moot if "the legality of the challenged practices" is still disputed because "[t]he [official] is free to return to his old

ways." *W.T. Grant Co.*, 345 U.S. 629 at 632, 73 S.Ct. 894 at 897, 97 L.Ed. 1303; *see Allee v. Medrano*, 416 U.S. 802, 810-11, 94 S.Ct. 2191, 2197-98, 40 L.Ed.2d 566 (1974); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43, 65 S.Ct. 11, 14, 89 L.Ed. 29 (1944); *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir.1982) (claim is moot if subsequent "events have completely and irrevocably eradicated the effects of the alleged violation").

Moreover, Russoniello continues to have available to him the necessary bilingual ballot lists to conduct a voter registration investigation similar to the one challenged here.[5] Because Russoniello is authorized to investigate election fraud and has the means to repeat a similar bilingual voter registration investigation, it is reasonable to believe that the appellants could be the targets of a similar investigation in the future. Thus, the same voting rights and constitutional issues are capable of repetition yet evading review.[6]

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[5] The Government points out that the Director of the Census now has determined that these counties no longer must provide bilingual ballot materials, *see* 49 Fed.Reg. 25,887-88 (June 25, 1984). Nonetheless, the election officials in San Francisco, Santa Clara, Alameda and Monterey counties will continue to provide the same bilingual ballot materials as previously required by section 203(b) of the Voting Rights Act, 42 U.S.C. § 1973aa-1a(b). Therefore, the Government again will be able to target, for a voter registration fraud investigation, foreign-born Chinese-speaking and Spanish-speaking voters by obtaining the names of newly-registered citizens who request bilingual voting materials.

[6] This case is distinguishable from *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974), and *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). In *O'Shea*, the plaintiffs challenged certain arrest and bail procedures employed by state law enforcement and judicial officials. However, to be subject to these alleged unlawful procedures one must first have violated some law and then have been arrested. 414 U.S. at 496, 94 S.Ct. at 676. The Supreme Court found that the plaintiffs had failed to show any case or controversy because presumably they would obey

Furthermore, because this case raises important voting rights and constitutional issues, a strong public interest requires us to address the appropriateness of the Government's investigatory methods. The existence of a "public interest in having the legality of the practices settled . . . militates against a mootness conclusion." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

In short, because there is a possibility of continuing adverse effects from the challenged governmental activities, and because the challenged activity is capable of repetition, yet evading review, and because of a strong public interest in having the legality of the challenged procedure determined, we conclude that a live case or controversy remains for purposes of granting equitable relief.

B. ***Standing***

[5] The Government contends that Olagues and the Organizations all lack standing to sue for equitable relief. "Standing is a threshold question in every case before a federal court." *McMichael v. County of Napa*, 709 F.2d 1268, 1269 (9th Cir. 1983). A party seeking to invoke the

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the law, and therefore never would become subject to any unlawful procedures. *Id.* at 497, 94 S.Ct. at 676. Unlike the situation before us, the plaintiffs in *O'Shea* did not assert any constitutional right to act in the same manner as they had acted before their arrest. *See id.* at 498, 94 S.Ct. at 677.

In *Lyons*, the plaintiff challenged the use of chokeholds by Los Angeles police on arrestees. The Court applied *O'Shea* and held that there was no case or controversy for equitable relief because whether Lyons would be arrested and subjected to a chokehold a second time was purely speculative. *See* 461 U.S. at 105-06, 103 S.Ct. at 1666-67.

Here, Olagues and the organizations assert that the Government's actions have interfered with constitutionally protected activities. Moreover, unlike the plaintiffs in *O'Shea* and *Lyons*, neither Olagues nor the Organizations need to break any law to be subjected to the challenged governmental conduct.

court's authority must demonstrate that it personally has suffered some actual or threatened injury as a result of the alleged illegal conduct of the other party. *Diamond v. Charles*, ____ U.S. at ____, 106 S.Ct. at 1702.

1. *Olagues*

[6] In the circumstances of this case, Olagues would have standing to seek equitable relief under the Voting Rights Act if he has suffered an injury that has more than a generalized grievance.[7] *See Allen v. State Board of Elections*, 393 U.S. 544, 554-57, 89 S.Ct. 817, 825-27, 22 L.Ed.2d 1 (1969). He has alleged an injury. His request for a bilingual ballot triggered an investigation of his INS records by the FBI and INS and an interview by the local District Attorney. Therefore, he was stigmatized as a person who might have registered to vote illegally. This, at a time when he was running for political office himself.

The Government contends that Olagues's alleged injuries are insufficient to warrant injunctive relief. The

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[7] Whether a plaintiff has standing under Article III involves constitutional and prudential limitations. *McMichael*, 709 F.2d at 1269-70 (citing *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979)). The constitutional limitations involve three components: (1) a threatened or actual "distinct and palpable" injury to the plaintiff; (2) a "fairly traceable causal connection" between that injury and the challenged conduct of the defendant; and (3) a "substantial likelihood" that the relief requested will redress or prevent the injury. *McMichael*, 709 F.2d at 1270. The prudential limitations require the plaintiff to:

> (1) assert the individual plaintiff's own rights;
> (2) have an injury that is more than a generalized grievance; and
> (3) have an interest arguably within the zone of interests protected or regulated by the statute or constitutional guarantee in question. *See id.* In this case, the only disputed factor is whether Olagues has an injury that is more than a generalized grievance.

Government categorizes the chilling effect injury as "subjective" and thus not justiciable under *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972).

In *Laird*, plaintiffs sought injunctive and declaratory relief against the Army's domestic surveillance system. *Id.* 408 U.S. at 2-8, 92 S.Ct. at 2320-23. The plaintiffs, however, were not targets of the surveillance, thus any chilling effect resulted merely from their knowledge of the surveillance activities. In this case, Olagues was in fact a target of Russoniello's investigation. Thus, the chilling effect stems from more than mere knowledge of a general investigation. Moreover, the Court in *Laird* recognizes that a plaintiff has standing when the government improperly imposes an affirmative obligation on him. *Id.* at 12, 92 S.Ct. at 2325. In this case, because he requested a bilingual ballot, the Government required Olagues to prove his citizenship, an affirmative obligation the Government did not place on people who request English language ballots. Therefore, we hold that Olagues has standing to sue for equitable relief.

2. *The Organizations*

Chinese for Affirmative Action is a voluntary membership group that seeks to protect the rights of Chinese-Americans. It monitors compliance with bilingual election requirements and encourages Asian-Americans to register and to vote. The Hispanic Coalition for Human Rights is an association of Hispanic organizations and persons of Mexican descent, with a goal of securing the civil rights of Hispanics. It encourages Hispanic Americans to register and to vote, and advises them on the availability of bilingual election materials. The San Francisco Latino Voter Registration Education Project is a coalition of Hispanic

groups that was conducting a voter education and registration drive at the time of the investigation.

An association-plaintiff has standing to seek redress of direct injury to the association itself. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40, 96 S.Ct. 1917, 1925, 48 L.Ed.2d 450 (1976); *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975); *NAACP v. Button*, 371 U.S. 415, 428, 83 S.Ct. 328, 335, 9 L.Ed.2d 405 (1963). Under certain circumstances, an association may also be entitled to seek redress for injury to its members. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *Simon,* 426 U.S. at 40, 96 S.Ct. at 1925; *Warth*, 422 U.S. at 511, 95 S.Ct. at 2211; *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972).

In *Hunt*, the Supreme Court established a three-part test to determine whether an association has standing: (1) either the group or its members must have suffered some direct, cognizable injury; (2) the interests the group seeks to protect must be germane to the organization's purpose; and (3) the claim or relief sought must not require the participation of the individual members in the suit. 432 U.S. at 343, 97 S.Ct. at 2441. A mere "abstract concern," *Simon*, 426 U.S. at 40, 96 S.Ct. at 1925, or "special interest" in a public issue, *Sierra Club*, 405 U.S. at 739, 92 S.Ct. at 1368, is legally insufficient to confer standing.

First, the Organizations contend that they have been injured in two ways. The investigators questioned foreign voters requesting bilingual ballots concerning who had assisted them in registering. The Organizations assert that the investigation has discouraged its members from participating in their associational activities, because they now fear that participation in the program to register voters will make them targets of a criminal investigation.

Therefore, the Organizations contends that the investigation cast a pall over their associational activities in violation of their first amendment rights. Moreover, while Russoniello stated that the federal government would not prosecute illegally registered voters, he raised the possibility that the state might prosecute them under state law. Thus, by discouraging their members from participating in the voter registration drives, and by discouraging citizens from registering to vote, the investigation directly undermined the Organizations' voter education and registration efforts.

The Organizations also assert that both they and their members are threatened with possible prosecution for violations of the Voting Rights Act. They contend that they are undoubtedly the targets of Russoniello's investigation and could be charged with improperly influencing ineligible persons to register.

We conclude that the Organizations' allegations raise sufficient claims of potential direct injury to both themselves and their members. In the case before us, the Organizations' voter education and registration efforts are unquestionably protected from unwarranted interference by prosecutorial officials; whether the investigation actually involved any unwarranted intrusions into their associational activities affects the merits of their claim, not their standing. Moreover, as stated above, members who participated in the Organizations' counseling activities and voter registration drives are potential targets of future prosecutions.

Second, we conclude that the interests the Organizations seek to protect are "germane" to their purposes. *See Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441. The Organizations' activities are centered on voter education and registration. Such activities are directly related to the individual member's interests in counseling and registering voters free from unwarranted governmental intrusions.

Third, the relief sought by the Organizations does not require the participation of individual members in the suit. *See id.* The principal claims are for injunctive and declaratory relief; such equitable relief is particularly suited for group representation. *See Warth*, 422 U.S. at 515, 95 S.Ct. at 2213. Thus, we conclude that the Organizations have standing to sue for equitable relief.

II. INJUNCTIVE RELIEF

The appellants sought to enjoin a preliminary investigation by a United States Attorney. The district court dismissed the appellants' complaint on the grounds that "as a matter of law" it lacked "jurisdiction to enjoin or otherwise control" such an investigation. We review this legal question *de novo*. *See United States v. Oregon*, 718 F.2d 299, 303 & n. 5 (9th Cir.1983). We conclude that the district court erred in ruling that it lacked jurisdiction. *See Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir.1978) (district court has jurisdiction to enjoin illegal conduct by a prosecutor). Therefore, the district court erred in dismissing the injunctive claims. We remand this issue to the district court to determine whether an injunction should issue.

III. DECLARATORY RELIEF

The district court granted summary judgment for the Government on the appellants' claim for declaratory relief. We determine *de novo* whether, viewing the evidence in the light most favorable to the party against whom summary judgment has been granted, the moving party has demonstrated that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Continental Casualty Co. v. City of Richmond*,

763 F.2d 1076, 1078-79 (9th Cir.1985); Fed.R.Civ.P. 56(c).[8]

A. *Equal Protection Claims*

1. *Level of Scrutiny*

The United States Attorney's investigation of voter fraud registration in the nine-county area targeted recently registered, foreign-born voters who requested bilingual ballots. The appellants contend that such a classification must be subjected to strict scrutiny under equal protection clause analysis because it discriminates on the basis of language, race, and national origin.

The district court analyzed the case by defining the classification solely on the basis of language and held that the classification does not involve a suspect class. Accordingly, the district court refused to apply the strict scrutiny standard and held that there was no equal protection violation.

Stated simply, the challenged investigation targeted recently registered, foreign-born voters who requested bilingual ballots. Bilingual ballots are only available in Spanish and Chinese. Therefore, as a practical matter, the investigation targeted Spanish-speaking and Chinese-speaking immigrants.

The traditional indicia of a suspect classification are whether the class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the ma-

[8] The district court erroneously applied the good faith immunity standard of *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), to grant summary judgment on the entire case. Qualified immunity, however, is only a defense to damages and does not bar equitable relief. *Wood v. Strickland,* 420 U.S. 308, 314 n.6, 95 S.Ct. 992, 997 n.6, 43 L.Ed.2d 214 (1975).

joritarian political process." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16 (1973). Whether the classification is based on an immutable characteristic is sometimes an indication of a suspect class. *See Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973). But immutability is not the sole determining factor. For example, the Supreme Court has held that aliens form a suspect class. *See Bernal v. Fainter*, 467 U.S. 216, 219, 104 S.Ct. 2312, 2316, 81 L.Ed.2d 175 (1984); *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852, 29 L.Ed.2d 534 (1971).

Congress has explicitly recognized that pervasive discrimination exists against linguistic minorities by requiring state governments to provide bilingual ballots even though their voters must achieve a minimum level of fluency in English to obtain United States citizenship.

> The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. . . . [T]hey have been denied equal educational opportunities by State and local governments resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation.

42 U.S.C. § 1973b(f)(1).

Moreover, an individual's primary language skill generally flows from his or her national origin. *See Yu Cong Eng v. Trinidad*, 271 U.S. 500, 517, 46 S.Ct. 619, 623, 70 L.Ed. 1059 (1926); *Berke v. Ohio Department of Public Welfare*, 628 F.2d 980, 981 (6th Cir.1980) (per curiam); 29 C.F.R. § 1606.7(a). The target groups in this

case are distinct and easily identifiable. Just as persons of different ethnic groups are distinguished by surnames, *Hernandez v. Texas*, 347 U.S. 475, 480 n. 12, 74 S.Ct. 667, 671 n. 12, 98 L.Ed. 866 (1954) (Spanish surnames reliably identify Hispanics, treated as a suspect class), persons of different nationalities are often distinguished by a foreign language. Here it is clear that the investigation targeted Chinese and Hispanic immigrants. The courts have long recognized the history of discriminatory treatment inflicted on Chinese and Hispanic people. *See, e.g. Hernandez v. Texas*, 347 U.S. at 475, 74 S.Ct. at 667; *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

In contending that a language-based classification is not the equivalent of a national origin classification, and thus does not denote a suspect class, the Government relies on *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir.1983) (English-only Social Security notices do not violate Spanish-speaking claimants' equal protection rights), *cert. denied*, 466 U.S. 929, 104 S.Ct. 1713, 80 L.Ed.2d 186 (1984); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (English-only Civil Service exams do not violate Hispanic individuals' equal protection rights); *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir.1980) (employer's English-only rule did not violate Title VII or section 1981), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981); and *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir.1978) (no right to bilingual education).

These cases are readily distinguishable from the instant case. They all involve a general classification of English-speaking versus non-English-speaking individuals. *See, e.g., Soberal-Perez*, 717 F.2d at 41. The instant case as a practical matter, however, involves a specific classification of Spanish-speaking and Chinese-speaking immigrants.

Thus, while a non-English-speaking classification is facially neutral with respect to ethnic group classification, the classification challenged here is not, because for all practical purposes it is a classification based on race and national origin.

Therefore, we hold that the three characteristics, i.e., foreign-born voter, recently registered voter, and bilingual ballot voter, taken together in the instant case form a class that has the traditional indicia of a suspect classification based on race and national origin. Accordingly, the district court erred in not applying the strict scrutiny standard to the equal protection issue raised in this case.

2. *Analysis*

We have concluded that the voter registration fraud investigation directed toward foreign-born, recently registered voters, requesting bilingual ballots involves a suspect classification. To survive an equal protection challenge under the strict scrutiny standard, a suspect classification must be necessary to serve a compelling governmental interest, and the governmental conduct must employ the least drastic means to achieve that compelling interest. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184-5, 99 S.Ct. 983, 990-1, 59 L.Ed.2d 230 (1979). Appellants concede that the government has a compelling interest in preventing voter registration fraud. *See Dunn v. Blumstein*, 405 U.S. 330, 345, 92 S.Ct. 995, 1004, 31 L.Ed.2d 274 (1972).

Because it failed to apply strict scrutiny analysis, the district court must determine on remand whether the classification used by the government is "necessary" to prevent voter registration fraud, and whether the investigation conducted was the least drastic means of achieving that governmental interest.

B. ***Substantive Due Process***

Voting is a fundamental right. *E.g., Dunn*, 405 U.S. at 336, 92 S.Ct. at 999. Classifications that burden the right to vote can be upheld only if they are necessary to advance a compelling governmental interest. *Id.* Moreover, the classification must be closely tailored to effectuate only that interest. *Zablocki v. Redhail*, 434 U.S. 374, 388, 98 S.Ct. 673, 682, 54 L.Ed.2d 618 (1978).

The appellants argue that the voter registration investigation had the practical effect of intimidating foreign-born citizens from registering to vote and from requesting bilingual voting materials. The appellants also contend that the number of new registrants in the final weeks decreased even though normally that is the most successful period for voter registration drives. Thus, there is a material issue of fact as to whether the classifications burdened the appellants' right to vote, and the district court erred in granting the government's summary judgment motion on the substantive due process issue.

C. ***Voting Rights Act***

The district court dismissed the Voting Rights Act claim against Russoniello, Ilchirt, and the county officials on the basis that the Act does not expressly provide for a right of action against federal officials. However, as discussed below, we find that the appellants have failed to establish a Voting Rights Act violation. To establish a Voting Act violation, unlike a constitutional violation of a citizen's right to vote, the plaintiff must show an intent to deny or abridge the right to vote. Thus, we need not decide whether a claim for relief against federal officials may be asserted under the Voting Rights Act or whether the county officials would be protected as Russoniello's agents.[9]

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[9] The appellants also ask for statutory damages under the Voting Rights Act. Private litigants have an action against state officials for

The appellants contend that Russoniello and the county defendants violated 42 U.S.C. § 1973b(f)(2), which reads:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *to deny or abridge* the right of any citizen of the United States to vote *because* he is a member of a language minority group.

[Emphasis added.)

The county officials applied a procedure to Spanish-speaking and Chinese-speaking voters that they did not apply to other voters. Voters requesting bilingual ballots were asked as part of the investigation to prove their citizenship and were questioned in some instances by the FBI. There is, however, no evidence that by investigating the individual appellants, the Government intended to deny or abridge their right to vote.[10]

Apparently, the appellants contend that the Government also violated 42 U.S.C. §§ 1971(b) and 1973i(b). Under these sections no person may intimidate, or attempt to intimidate any person from voting or from aiding someone to vote. In the instant case, there is evidence that the investigation did intimidate the appellants. However, that is insufficient. The appellants failed to raise a material

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declaratory and injunctive relief under 42 U.S.C. § 1973c. *Allen v. State Board of Elections,* 393 U.S. 544, 555, 89 S.Ct. 817, 826, 22 L.Ed.2d 1 (1969). The Act, however, does not specify any statutory damage remedies for private plaintiffs. Because the appelants have failed to establish that a Voting Rights Act violation exists, we need not decide this issue.

[10] The county officials also contend that their participation in the investigation is too attenuated to constitute a violation of 42 U.S.C. § 1973b(f)(2). They argue that their only role was to disclose public records, and that their participation did not interfere with anyone's right to vote. Because there is no Voting Rights Act violation, we need not reach this issue.

issue of fact as to whether the government officials did in fact *intend* to intimidate them. *See United States v. McLeod*, 385 F.2d 734, 740-41 (5th Cir.1967).

Nor is there a claim under 42 U.S.C. § 1973aa-1a. The appellants failed to set forth a factual basis for their allegation that the county officials failed to provide bilingual ballots in compliance with that section.

Therefore, there is no material issue of fact or law, and the district court did not err in granting summary judgment on the Voting Rights Act claims.

D. ***The First Amendment***

The appellants contend that the district court erred in dismissing their first amendment claim. They allege that the investigation directly interfered with their constitutional right of association and political expression.[11]

The record provides support for the appellants' assertions that the voter registration fraud investigation discouraged the Organizations' members from participating in associational activities. Some members asserted that participation dropped off because the in-

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[11] The district court found that: (1) the minimal intrusion imposed by defendants' conduct was clearly outweighed by the government's interest in preventing voter fraud; and (2) to the extent that plaintiffs allege defendants' actions "chilled" their first amendment rights merely by conducting the investigation, the complaint must be dismissed for failure to state a claim, *Laird v. Tatum,* 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972).

A dismissal under *Laird* would not be a dismissal for failure to state a claim, but a dismissal for lack of jurisdiction. In *Laird,* the parties challenging the Army's surveillance operations were not, themselves, targets of the surveillance. The Court held that, in this context, allegations of a subjective "chill," without more, were not sufficient to confer standing. 408 U.S. at 13-14, 92 S.Ct. at 2325-26.

Laird is factually distinguishable from this case, where the parties challenging the investigation are *targets* of the investigation. Here, the appellants clearly have standing to assert their first amendment rights.

vestigation: (1) discredited the Organizations' activities in their communities; (2) caused members to lose confidence in the democratic process; and (3) targeted members for a prosecutorial investigation. The government did not refute any of these assertions.

Therefore, viewing the evidence in the light most favorable to the appellants, there is a material issue of fact as to the extent of the burden on the appellants' first amendment rights. Thus, the district court erred in finding as a matter of law that the Government's interest in preventing voter fraud outweighed the appellants' first amendment interests. We also remand this issue to the district court.

IV. DAMAGE CLAIMS

The appellants' complaint may be read to include a request for damages based on constitutional or statutory claims such as section 1983, 42 U.S.C. § 1983. We agree with the district court that the government officials involved in this action would be entitled to immunity from such damage claims.

State prosecutors are absolutely immune from damage suits with respect to their quasi-judicial activities. *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S.Ct. 984, 994-95, 47 L.Ed.2d 128 (1976). Federal prosecutors are also absolutely immune with respect to their quasi-judicial activities, *Butz v. Economou*, 438 U.S. 478, 516-17, 98 S.Ct. 2894, 2915-16, 57 L.Ed.2d 895 (1978); however, they receive only good faith immunity for prosecutorial activities that are merely administrative or investigative, *Jacobson v. Rose*, 592 F.2d 515, 524 (9th Cir.1978), *cert. denied*, 442 U.S. 930, 99 S.Ct. 2861, 61 L.Ed.2d 298 (1979). Other executive officials are entitled to qualified immunity, *see e.g., Scheuer v. Rhodes*, 416 U.S. 232, 247-48, 94 S.Ct. 1683, 1691-92, 40 L.Ed.2d 90 (1974) (state executive officials).

We need not determine whether the district court erred in denying absolute immunity, because we agree that as a matter of law all those sued are entitled at least to qualified, good faith immunity. The controlling standard is "the objective reasonableness of an official's conduct, as measured by reference to *clearly established* law." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2737, 73 L.Ed.2d 396 (1982) (emphasis added).

Under this objective standard, all the government officials are entitled to immunity. In the instant case, all of the appellants' claims under the Voting Rights Act and the first, fifth, fourteenth, and fifteenth amendments to the Constitution raise issues of first impression. Therefore, the government officials did not violate "clearly established" rights.

V. ATTORNEY'S FEES

The appellants seek costs and attorney's fees for the appeal pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, and the Equal Access to Justice Act, 28 U.S.C. § 2412. We grant costs pursuant to 28 U.S.C. § 2412(a) because the appellants have prevailed in part on appeal. *Cf. Thomas v. SS Santa Mercedes*, 572 F.2d 1331, 1335 (9th Cir. 1978). We deny the appellants' request for attorney's fees on appeal, however, because the appellants did not prevail on their section 1983 claims, *see* 42 U.S.C. § 1988, and because we are unable to say that the government's position on appeal was not substantially justified, *see* 42 U.S.C. § 2412(d). The appeal raised issues of first impression. *See Foster v. Tourtellotte*, 704 F.2d 1109, 1113 (9th Cir.1983).

AFFIRMED in part and REVERSED in part and REMANDED for further proceedings in light of this opinion.

WALLACE, Circuit Judge, with whom SNEED, ALARCON, and BEEZER, Circuit Judges, join, dissenting:

I dissent from the majority's opinion in this case and adhere to the analysis originally stated in the withdrawn panel opinion, *Olagues v. Russoniello*, 770 F.2d 791 (9th Cir.1985) (*Olagues I*), *withdrawn for rehearing en banc*, Nos. 82-4427, 83-2581 (9th Cir. Jan. 21, 1986). Although I agree with part of the majority opinion, I believe the majority's reasoning is deficient in several respects. I do not agree with the majority's conclusion that Olagues has standing to seek injunctive relief absent a substantial possibility that he will be subjected to a future investigation of voting abuses. In addition, I see no reason to remand this case since the district court would lack the power to grant injunctive relief. Finally, I believe that the majority is wrong in requiring that the language-based classifications challenged here be subject to strict scrutiny.

I

In its description of the facts in this case, the majority omits crucial information regarding the genesis and scope of Russoniello's investigation. *See Olagues I,* 770 F.2d at 794. The United States Attorney had received information from the Santa Clara County district attorney which indicated that a substantial number of recently registered foreign-born voters were noncitizens who had been registered illegally. The information was based on a study of recent registrants whose primary language skill was not English. Many of the noncitizen registrants apparently believed, or were told, that they were entitled to register and vote on the basis of long periods of residence in this country or of marriage to United States citizens.

The United States Attorney was justifiably concerned that the right of citizens to vote was being diluted by wholesale registration of noncitizens. He therefore

launched a carefully-crafted investigation to determine whether there existed in Santa Clara County, and surrounding counties, any organized effort to register noncitizens to vote. Such a conspiracy would be punishable under federal law. *See* 42 U.S.C. § 1973dd-3(c). He sought a random sampling of names from voters registration lists of recently registered foreign-born voters who had requested bilingual ballots in each of these counties. Based on information the United States Attorney has received, this group was most likely to yield individuals who had been illegally registered. Noncitizens are more likely to request bilingual ballots, if only because knowledge of English is generally *required* before a foreign born individual may become a naturalized citizen. *See* 8 U.S.C. § 1423(1). Bilingual ballots were provided in Spanish and Chinese in the relevant counties because of large Hispanic and Chinese communities. Voter registration drives had recently been conducted in those communities, and possibly were connected to the registration of large numbers of noncitizens.

After obtaining names of foreign-born voters who had requested bilingual ballots, the United States Attorney further refined the scope of his inquiry by asking the Immigration and Naturalization Service (INS) to verify the citizenship of the registrants. Only when the INS was unable to identify many of these persons as citizens did county district attorneys conduct interviews with possible noncitizen voters, at the request of the United States Attorney. The purpose of these interviews of registrants, as stated by the United States Attorney to the county district attorneys, was "to determine (1) the basis upon which they claim citizenship and entitlement to vote and (2) in cases in which they are unable to prove citizenship, what representations were made to them by Registrars as to their qualification to vote." Federal prosecution of registrants was neither contemplated nor threatened; the investigation

was instead conducted with the intent of identifying and possibly prosecuting any persons who conspired to register them illegally. No one was prosecuted on the basis of information obtained in the voluntary interviews, and the investigation was terminated.

II

I agree with the majority that this case is not moot, and that the organizations have standing sufficient to afford jurisdiction over this case. The majority's analysis adds little to what was stated in *Olagues I*. *Compare* maj. op. at 1515-1517, 1518-1519 *with Olagues I*, 770 F.2d at 794-96, 797-99. What it does add may muddy analysis of these issues. For example, it is unclear how the United States Attorney "raised the possibility that the state might prosecute [noncitizen registrants] under state law," maj. op. at 1519, in a way that could add to the organizations' standing. The federal and state governments are independent sovereigns, and the United States Attorney has no power to initiate prosecutions under state law. The record clearly indicates that Russoniello was not concerned with and did not encourage any prosecutions under state law.

III

I do not agree that Olagues has standing to seek equitable relief in this case. No doubt, Olagues has standing to seek damages if his rights were violated by the government's investigations. However, the majority fails to recognize that with respect to equitable relief, Olagues's position is fundamentally different from that of the organizations. "[U]nlike Olagues, members who participated in the organizations' counseling activities and voter registration drives are potential targets of future prosecutions." *Olagues I*, 770 F.2d at 799.

The majority writes that "equitable relief is particularly suited for group representation." Maj. op. at 1519; *see Olagues I,* 770 F.2d at 799. On the facts of this case, I agree that the prosecutorial investigation was sufficiently "targeted" at the organizations to give them "case or controversy" standing. *See id.* at 798. I agree with the majority that the threat of another investigation, possibly followed by criminal prosecutions, may engender fear in its members "that participation in the program to register voters will make them targets of a criminal investigation," and that this in turn may hinder the organizations' protected activities. *See* maj. op. at 1518-1519. The point is that the organizations and their members "are threatened with possible prosecution for violations of the Voting Rights Act." Maj. op. at 1519. Olagues is not similarly threatened.

The majority's observation that Olagues differs from the plaintiffs in *Laird v. United States*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972) (*Laird*), because those plaintiffs' "were not targets of" governmental investigation, maj. op. at 1518, adds little. It demonstrates only that this case is distinguishable from *Laird* because Olagues suffered a past injury. I agree that alleged past injury gives Olagues, unlike the plaintiffs in *Laird*, standing *to seek damages*. The majority errs by somehow extending this standing to seek relief for past injury into standing to seek relief for prospective injury. It is quite clear that such standing to seek damages is insufficient to afford standing for prospective relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103, 105-06, 109, 103 S.Ct. 1660, 1666-67, 1669, 75 L.Ed.2d 675 (1983) (*Lyons*).

Olagues has never been threatened with prosecution by federal authorities. Instead, "he seeks to enjoin prosecutorial activities which are focused on persons other than himself." *Olagues I,* 770 F.2d at 797. Although he was investigated because the government had reason to believe

that Olagues was a noncitizen who had been illegally registered to vote, the result of the investigation was to demonstrate that Olagues is a citizen, legally registered to vote. There is little reason to believe that the government will again investigate Olagues as a possible noncitizen voter. The majority does not explain how Olagues has made "a reasonable showing that he will again be subject to the challenged activity." Maj. op. at 1516. In fact, it appears highly unlikely that, even in the event of a similar future investigation, Olagues's name would again be drawn in a small random sample of *recently registered* bilingual voters from his country, or that he would again be mistaken for a noncitizen.

Even given the very remote possibility that the government might again investigate Olagues, the investigation in this case involved purely voluntary, noncoercive interviews—with no threat of federal prosecution. At best, Olagues, as a legally registered voter, can allege a de minimis "chilling effect" on his right to vote. It is difficult to understand how Olagues was "stigmatized" by the investigation, since it was not publicized, or how the majority finds it relevant that Olagues "was running for political office himself." Maj. op. at 1518. Olagues simply does not have standing to seek prospective relief.

IV

The majority also neglects to respect the special limitations on our power to enjoin criminal investigations by the executive branch of our government. *See Olagues I,* 770 F.2d at 799-801. "[A] court may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of [a prosecutor] unless there is a clear basis in fact and law for doing so." *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977).

Without doubt, district courts may, under appropriate circumstances, have power to enjoin illegal prosecutorial actions. We recognized the possible existence of such power in *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir.1978) (*Jett*), and indeed, the majority relies on *Jett*. Maj. op. at 1519. What the majority fails to recognize are the strict limitations we placed in *Jett* on the judiciary's power to enjoin prosecutorial investigations. In *Jett*, we held that federal courts may not supervise the executive's "preliminary conduct" in criminal prosecutions. *Jett*, 578 F.2d at 845. This conclusion was based on our concern for the constitutional separation of powers. *See id.* It was not premised on the desirability or legality of prosecutorial actions in any given case. We recognized that the separation of powers principle may not mandate judicial inaction in a case where the executive outrageously oversteps the limitations on prosecutorial power. Thus, we stated that a prosecutor "may be subject to a suit to enjoin *egregiously illegal* conduct." *Id.* (emphasis added).

Other courts have similarly recognized that "[o]nly the most extraordinary circumstances warrant anticipatory judicial involvement in criminal investigations." *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C.Cir. 1978) (*Reporters Committee*), *cert. denied*, 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979); *see also LaRouche v. Webster*, 566 F.Supp. 415, 417 (S.D.N.Y. 1983) (*LaRouche*) ("party seeking to enjoin a criminal investigation bears an almost insurmountable burden"); *see generally Olagues I*, 770 F.2d at 799-801. In the context of a good faith criminal investigation, the plaintiffs should be required to show "a *clear and imminent* threat of such future [prosecutorial] misconduct." *Reporters Committee*, 593 F.2d at 1071 (emphasis in original).

The majority acknowledges that the criminal investigation in this case was undertaken in good faith. *See* maj. op. at 1523 (based on the good faith standard, all individual defendants are entitled to immunity). There is nothing egregious about the prosecutorial conduct in this case. Nor is there any *imminent* likelihood that the investigation will be repeated. Because there are no extraordinary circumstances that outweigh general concerns regarding the separation of powers, I can only conclude that a federal court is powerless to award relief.

Jett's requirements for equitable relief against a prosecutorial investigation cannot be met on the facts alleged in this case. *Cf. Lyons*, 461 U.S. at 103, 105-06, 103 S.Ct. at 1666-67; *O'Shea v. Littleton*, 414 U.S. 488, 499-502, 94 S.Ct. 669, 677-79, 38 L.Ed.2d 674 (1974). If the district court applies the law of our circuit, it can only deny the plaintiff's claims for equitable relief. *See Jett*, 578 F.2d at 845. Thus, I see no reason for a remand.

V

I also dissent from the majority's conclusion that the language-based classifications used by Russoniello in this case must be subjected to strict scrutiny. Even if they are, the need for prosecutorial consideration of such factors is sufficiently compelling to survive the test.

A.

The majority attempts to distinguish several cases on the ground that "[t]hey all involve a general classification of English-speaking versus non-English-speaking individuals," while this case "as a practical matter . . . involves a specific classification of Spanish-speaking and Chinese-speaking immigrants." Maj. op. at 1521, *purporting to distinguish Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir.1983) (*Soberal-Perez*), *cert. denied*, 466 U.S. 929,

104 S.Ct. 1713, 80 L.Ed.2d 186 (1984); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir.1975); *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir.1980) (*Garcia*), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981); *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir.1978).

I find the majority's ground for distinction of these cases "as a practical matter" to be extraordinarily vague. *Garcia*, for example, involved "a rule prohibiting employees from speaking Spanish on the job," which rule affected only those employees who were Hispanic. 618 F.2d at 266-67. Nevertheless, the court held that discrimination with respect to language was *not* equivalent to discrimination because of national origin. *Id.* at 268. It is not clear what "practical" distinction the majority intends to draw.

More importantly, I think that the foundation of the majority's purported distinction is conceptually flawed. Why, if a classification based upon English-speaking versus non-English-speaking persons implicates no suspect classification, does a classification between Spanish-speaking and non-Spanish-speaking persons raise special constitutional problems? The majority answers that "a non-English-speaking classification is facially neutral with respect to ethnic group classification." Maj. op. at 1521. Somehow, discrimination against speakers of minority languages is suspect, *unless* that discrimination is instituted across-the-board, against *all* minority languages, and in favor of the majority of English speakers alone. I suggest that this makes little sense. Either language is suspect, or it is not. Clearly it is not. *See Olagues I*, 770 F.2d at 801-02 (discussing Supreme Court precedent).

B.

Ultimately, the majority fails to hold that language-based classifications must be subjected to strict scrutiny. Instead, it holds that "the three characteristics, i.e., foreign born voter, recently registered voter, and bilingual ballot voter, taken together in the instant case form a class that has the traditional indicia of a suspect classification based on race and national origin." Maj. op. at 1521. This is a surprising conclusion.

If language by itself does not define a suspect classification, it is difficult to understand why the other factors considered by Russoniello—which narrowed his investigation—require strict scrutiny. The other two factors reflect the United States Attorney's efforts to narrow his inquiries to those persons who may have knowledge of serious criminal activity. It is the height of irony to hold, as the majority now implicitly does, that Russoniello's actions are suspect precisely because they are narrowly tailored to his purpose of uncovering crime. Certainly, he committed no invidious discrimination by focusing on foreign birth. With scant exceptions, anyone born in this country is a citizen. U.S. Const. amend. XIV, § 1; *United States v. Wong Kim Ark*, 169 U.S. 649, 682, 18 S.Ct. 456, 469, 42 L.Ed. 890 (1898) (excepting "children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State"). The criminal activity he sought to root out was illegal registration of *non* citizens. Russoniello could not enforce the law against registration of noncitizens without considering the factor of foreign birth. Similarly, the factor of recent registration does not define or even suggest any invidious discrimination against a suspect class. It simply focused Russoniello's investigation on persons who had registered at a time that illegal registrations may have been rampant and who, if they were witnesses to criminal activity, would be more

likely to recollect details than would be long-registered noncitizen voters. No doubt, the United States Attorney will be puzzled that his efforts to narrow carefully the scope of his investigation are precisely the basis of the court's conclusion that his investigation is suspect and must be subjected to strict judicial scrutiny. The majority's opinion suggests that, on the other hand, had he been sloppy in defining the scope of his work and less concerned with the consequences of an over-broad investigation, the majority would perhaps review his actions more leniently.

C.

The majority applies strict scrutiny on the ground that the United States Attorney's language classifications *in practice* discriminated on the basis of race and national origin. Maj. op. at 1521. I instead agree with the Second Circuit that strict scrutiny of language classifications is warranted only when a plaintiff has shown an intent to discriminate on the basis of a suspect class. *See Soberal-Perez*, 717 F.2d at 42. To establish intentional discrimination, a plaintiff must demonstrate that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Id., quoting Personnel Administrator v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). A gulf separates our case from cases such as *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), in which a facially neutral statute was administered "with an evil eye and an unequal hand" to discriminate against a minority on the basis of race or national origin. The majority fails to bridge that gulf.

To the extent that the language classifications enabled the United States Attorney to reach persons of Chinese or Hispanic ancestry, it is apparent that recently-registered

voters from the Chinese-American and Hispanic-American communities were most likely to be able to furnish him with valuable information for the criminal investigation of a pattern of illegal voter registration he had reason to believe was occurring in those communities. We have no reason to believe that his decision to interview these persons was motivated by anything other than a desire to investigate potentially serious criminal activity, and indeed the majority concedes that the investigation was conceived and conducted in good faith. Maj. op. at 1523. No discriminatory intent can be inferred.

Finally, I observe that considerations of national origin or race are relevant in many prosecutorial investigations conducted by the executive branch. *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87, 95 S.Ct. 2574, 2582-83, 45 L.Ed.2d 607 (1975). (Mexican appearance may be considered in decision to stop automobile to question occupants regarding immigration violations). Under the majority's analysis, if officers had reason to believe that a murder had been committed in the Chinese-American community by a Chinese-American, their decision to interview Chinese-Americans in hopes of obtaining leads would be subjected to exacting scrutiny. I cannot agree that such choices are properly subjected to heightened scrutiny. Nor can I agree that they would fail to pass muster if they were. Some degree of common sense must animate our constitutional interpretations. Such investigatory decisions are indeed necessary to serve the compelling interest of fighting crime in an efficient and effective manner.

VI

Olagues and the organizations also argue that the United States Attorney unconstitutionally burdened their right to vote and their first amendment rights. I reject their arguments on the grounds stated in *Olagues I*. *See* 770 F.2d

at 802. It is difficult to see how any "burden" was placed on anyone's right to vote since no individual citizen was denied his right to vote. Russoniello's preliminary inquiry was aimed at ferreting out potential voting fraud, in order to enhance the right to vote of those who qualified. Individual citizens who were initially identified as not qualified were thereafter only the subject of narrowly confined, noncoercive follow-up interviews probing potentially unlawful activities of others. Even if we construe this as a "burden," it is a burden that all citizens must be asked to bear when they are potential witnesses to unlawful conduct.

Similarly, the incidental burden (if any) that may have been placed on first amendment associational rights must give way to the government's need to ensure the sanctity of the polls. Investigative activity inherently "affects or 'implicates' First Amendment activity." *Reporters Committee*, 593 F.2d at 1059 (emphasis omitted). The review of public records cannot involve any violation of first amendments rights. Moreover, the follow-up questioning of potential witnesses also is lawful. *See, e.g., Jones v. Unknown Agents of the Federal Election Commission*, 613 F.2d 864, 877-78 (D.C.Cir.1979) (upholding questioning of campaign contributors regarding illegal contributions), *cert. denied*, 444 U.S. 1074. 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980); *La-Rouche*, 566 F.Supp. at 418 ("As long as reasonable cause to investigate exists, the mere asking of material questions does not constitute a First Amendment violation.")

For all of the above reasons, I would affirm the judgment of the district court.

HUG, Circuit Judge, dissenting:

I dissent from the majority opinion because I conclude the case is moot. The majority opinion acknowledges in Section IV that the appellants cannot, as a matter of law, establish a claim for damages because the government

officials are entitled to immunity. Thus, the only possible viable claim is for injunctive or declaratory relief.

As the majority opinion properly notes, claims for declaratory or injunctive relief become moot when the challenged activity ceases, unless one of the limited exceptions identified in the majority opinion comes into play. I find insufficient grounds to invoke an exception.

The investigation was brought about by allegations of particular voter fraud; these were investigated and the matter was dropped, with no charges filed or further investigation sought. There is no threat of continued investigation nor any contention that there is any suspected voter fraud that would again lead to such an investigation. I conclude that there is insufficient indication that there again would be the allegations of voter fraud sufficient to bring about a similar investigation, that the investigation would be pursued in the same fashion, or that the county officials would participate in the same way in such an investigation. Nor do I discern any substantial continuing effects from the past investigation sufficient to sustain a finding of a live controversy. Therefore, I conclude that the claims for injunctive and declaratory relief are moot under the authority of *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) and *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). I would affirm the summary judgment on the claims for damages and remand the claims for injunctive and declaratory relief to be vacated as moot.

SNEED, Circuit Judge, concurring in Circuit Judge Wallace's dissent:

I concur in Judge Wallace's dissent. I write only to underscore Judge Wallace's dissent.

The United States Attorney focused upon (1) recently registered, (2) foreign born voters, (3) who requested bilingual ballots. Only Spanish and Chinese bilingual ballots existed. The purpose was to determine if any such persons were not United States citizens. Non-citizens were not entitled to vote.

The heart of the majority opinion appears in the following lines:

> "The instant case as a practical matter, however, involves a specific classification of Spanish-speaking and Chinese immigrants. Thus, while a non-English-speaking classification is facially neutral with respect to ethnic group classification, the classification challenged here is not, because for all practical purposes it is a classification based on race and national origin." Maj. Opinion, p. 1521, lines 13-19.

No further explanation is offered. The United States Attorney's target was noncitizens attempting to vote. That is not a suspect class. True, his investigation was aimed at a possibly large pool of offenders. That Hispanics and Chinese make up that pool is the consequence of geography, history, and the Voting Rights Act, not the discriminatory bias that the majority ascribes to the fact. One does not have to hold a doctorate in history to know that voting by non-citizens has occurred in our nation's history from time-to-time. Had the plaintiffs' alleged that the United States Attorney commenced his investigation to abridge the right of Chinese and Hispanic citizens to vote, an action under the Voting Rights Act would have been alleged. The majority correctly holds no such claim was alleged.

The classification employed by the United States Attorney was crafted to discover fraudulent voting. It was "for all practical purposes" nothing more.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-4427
D.C. No. CV-82-2102

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS-APPELLEES.

No. 83-2581
D.C. No. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS, CHINESE FOR AFFIRMATIVE ACTION, AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; O'MALLEY, WILLIAM A., INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; UNDERWOOD, LON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; SMITH, ARLO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY, ET AL., DEFENDANTS-APPELLEES.

[Filed Jan. 21, 1986]

ORDER

Before: BROWNING, Chief Judge, GOODWIN, WALLACE, SNEED, KENNEDY, ANDERSON, HUG, TANG, SKOPIL, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, FERGUSON, NELSON, CANBY, BOOCHEVER, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, AND KOZINSKI, Circuit Judges.

Upon the vote of a majority of the regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Rule 25 of the Rules of the United States Court of Appeals for Ninth Circuit. The previous three-judge panel assignment is withdrawn.

/s/ JAMES R. BROWNING
Chief Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 82-4427, 83-2581

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS-APPELLEES.

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS, CHINESE FOR AFFIRMATIVE ACTION, AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS-APPELLANTS,

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Appeal from the United States District Court for the Northern District of California.

Argued and Submitted Sept. 12, 1984

Decided Sept. 3, 1985

Before WALLACE, ALARCON, and NELSON, Circuit Judges.

WALLACE, Circuit Judge.

Olagues, a citizen, and certain organizations promoting the voting rights of Chinese Americans and Hispanic or Chinese ethnic backgrounds in the San Francisco Bay area (the organizations) sued for damages and declaratory and injunctive relief arising from a preliminary investigation by the United States Attorney and various state officials into possible violations of the Voting Rights Act of 1965, 42 U.S.C. § 1973i(c), (d) (the Act), which prohibits the illegal registration of voters or conspiracies to illegally register voters. Olagues and the organizations claim violations of their rights under the Act and the first, fifth, fourteenth, and fifteenth amendments to the Constitution. The district court dismissed the injunctive claims on the ground that it lacked jurisdiction to enjoin an investigation by the United States Attorney. The district court also granted summary judgment in favor of the United States Attorney and the state officials on the remaining claims. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

In March and April of 1982, United States Attorney Russoniello received information from the Santa Clara County district attorney indicating that a substantial number of foreign-born individuals who had recently registered to vote were not United States citizens. The information was contained in a study of recent voter registrants whose primary language was not English. Many of the noncitizen registrants apparently believed or

were told that they were entitled to vote on the basis of marriages to United States citizens or a long period of residence in the United States. Russoniello also was informed that the Spanish translation of the voter registration form erroneously stated that registrants "should be" a United States citizen, rather than stating one "must be" a citizen.

Russoniello then sent a letter on April 19, 1982, to law enforcement officers and voter registrars in nine local counties within his jurisdiction requesting their cooperation in obtaining a sampling of names from voter registration lists in order to determine whether the improper registration problem noticed in Santa Clara County was more widespread. The letter requested the forwarding of 25 names, randomly selected of recently registered, foreign-born voters who requested bilingual ballots. The letter indicated that upon receipt of the sampling, the names would be forwarded to the Immigration and Naturalization Service (INS) to determine each individual's citizenship status. He recommended that those individuals who the INS indicated were not citizens be interviewed thereafter. Russoniello stated that he did not intend to prosecute any improperly registered voters, but that he would consider prosecuting individuals who deliberately conspired to register unqualified voters if evidence of such impropriety surfaced.

The local officials responded by forwarding the names of 168 persons, one of whom was Olagues, from the public voting lists which were subsequently checked by the INS. At Russoniello's request, local officials then conducted voluntary interviews with some of the 113 individuals whom the INS could not positively identify as citizens to determine their citizenship and, if the individuals proved

not to be United States citizens, the circumstances surrounding their registration. No further investigation occurred.

II

Because the investigation has terminated, we first must determine whether there remains a live controvesy for purposes of granting equitable relief. There is no question that a controversy remains with respect to damages.

We begin this analysis with the recognition that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy" for equitable relief. *O'Shea v. Littleton*, 414 U.S. 488, 495, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) (*O'Shea*). Claims for equitable relief therefore become moot when the challenged activity ceases if subsequent events show that the activities "could not reasonably be expected to recur," *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1009 (9th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct, 1047, 59 L.Ed.2d 90 (1979), unless there is a possibility of "continuing, present adverse effects." *O'Shea*, 414 U.S. at 496, 94 S.Ct. 676.

There is a heavy burden, however, on the defendant to show that there is no reasonable expectation of repetition. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953) (*W.T. Grant*). Voluntary cessation of the challenged activity by the official is insufficient to render a case moot if "the legality of the challenged practices" is still in dispute because "[t]he defendant is free to return to his old ways." *Id.* at 632, 73 S.Ct. at 897. *See Allee v. Medrano*, 416 U.S. 802, 810-11, 94 S.Ct. 2191, 2197-98, 40 L.Ed.2d 566 (1974); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43, 65 S.Ct. 11, 14, 89 L.Ed. 29 (1944); *Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1291 (9th Cir. 1982) (claim is moot if subsequent "events have completely and irrevocably eradicated

the effects of the alleged violation"). Moreover, a case or controversy for purposes of article III may also remain live following cessation of the challenged activity if the actions are capable (1) of repetition and (2) of evading review. *See, e.g., Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115, 122, 94 S.Ct, 1694, 1698, 40 L.Ed.2d 1 (1974). Finally, the existence of "a public interest in having the legality of the practices settled . . . militates *against* a mootness conclusion." *W.T. Grant,* 345 U.S. at 632, 73 S.Ct. at 897 (emphasis added).

Applying this framework to the case before us, we find several factors pointing toward the continuing existence of a case or controversy for purposes of evaluating plaintiffs' equitable claims. First, the United States Attorney did not voluntarily cease the challenged activity because he felt that the investigation was improper. Rather, Russoniello terminated the investigation solely because it failed to produce evidence supporting any further investigative activities. Russoniello has at all times continued to argue vigorously that his actions were lawful.

Second, there has been no showing that an investigation conducted in the same manner against the same groups would not recur. Although Russoniello and the state officials point out that the Director of the Census now has determined that these counties no longer must provide bilingual ballot materials *see* 49 Fed. Reg. 25,887-88 (June 25, 1984), Olagues and the organizations correctly observe that election officials in San Francisco, Santa Clara, Alameda and Monterey counties will continue to provide the same bilingual ballot materials as previously required by section 203(b) of the Voting Rights Act, 42 U.S.C. § 1973aa-1a(b). Thus, Russoniello will continue to have the means available to conduct an investigation similar to the one challenged here. It is immaterial that the tools useful for discriminatory purposes are furnished by the

state rather than by the federal government; what matters is whether federal officials may utilize them.

Russoniello is certainly empowered to investigate election fraud; it would not be unreasonable to believe that a similar investigation might arise at some point in the future. Thus, the same issues are capable of repetition. At the same time, these investigations, such as the one in the present case, may be of very short duration, making them effectively capable of evading review by an appellate court. *E.g., Nebraska Press Association v. Stuart,* 427 U.S. 539, 546-47, 96 S.Ct. 2791, 2796-97, 49 L.Ed.2d 683 (1976).

Other factors also suggest a live controversy. The organizations argue that their organizational efforts have been handicapped as a result of the fear engendered by this investigation. They contend that unless the legality of the investigation is determined, they may continue to suffer these chilling effects despite the termination of the initial investigation. Furthermore, there is a significant public interest in addressing both the appropriateness of permitting a challenge to a federal investigation, which raises separation-of-powers concerns, and the appropriateness of the investigatory methods employed, which raises voting rights and first amendment concerns.

This case is distinguishable from *O'Shea* and *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (*Lyons*). In *O'Shea,* the plaintiffs challenged certain arrest and bail procedures employed by state law enforcement and judicial officials. In order to be subject to these alleged unlawful procedures, however, one would first have had to violate some law and then have been arrested. 414 U.S. at 496, 94 S.Ct. at 676. The Supreme Court found that plaintiffs failed to show any case or controversy because it presumed that plaintiffs would obey the law, and therefore they never would become subject to any unlawful procedures in the future. *Id.* at 497, 94 S.Ct.

at 676. Unlike the situation before us, the *O'Shea* plaintiffs did not claim any constitutional right to act as they had prior to their arrest. *See id.* at 498, 94 S.Ct. at 677. In *Lyons,* the plaintiff challenged the use of chokeholds by Los Angeles police on arrestees. The Court again held that there was no case or controversy for equitable relief because whether Lyons would again be arrested and subjected to a chokehold a second time was purely speculative. *See* 461 U.S. at 105-06, 103 S.Ct. at 1667.

Here, Olagues and the organizations claim that the actions of the officials have interfered with their constitutionally protected first amendment activities in registering voters. Unlike *O'Shea* and *Lyons,* neither Olagues nor the organizations had to break any law in order to be subjected to alleged unlawful conduct by the officials. Certainly the legality of the investigation at issue remains in dispute; both sides continue forcefully to advocate their positions. Russoniello has never seriously attempted to make any showing that the challenged investigative techniques will never be employed again; rather, he vigorously defends his investigative tactics. Thus, he fails to meet his "heavy burden" of showing mootness. *W.T. Grant,* 345 U.S. at 633, 73 S.Ct. at 897.

III

We next examine the standing of Olagues, a foreign-born citizen who requested bilingual election materials, and the organizations, which claim that the challenged investigatory activities will "effectively deny their right to participate in the electoral process."

We recently summarized the law relating to standing required by article III of the Constitution:

> Standing is a threshold question in every case before a federal court. Before the judicial process may be invoked, a plaintiff must "show that the facts

> alleged present the court with a 'case or controversy' in the constitutional sense and that [he] is a proper plaintiff to raise the issues sought to be litigated." A party seeking to invoke the court's authority must demonstrate "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of the issues upon which the court so largely depends. . . ."
>
> The question of whether the plaintiff has standing involves both constitutional and prudential limitations. The constitutional limitations of article III involve three separate but interrelated components: first, a "distinct and palpable" injury to the plaintiff, be it "threatened or actual"; second, a "fairly traceable causal connection" between that injury and the challenged conduct of the defendant; and third, a "substantial likelihood" that the relief requested will redress or prevent the injury.

McMichael v. County of Napa, 709 F.2d 1268, 1269-70 (9th Cir. 1983) (citations omitted).

Olagues would generally have standing under the Act if he is an "aggrieved person," broadly defined as one who has suffered an injury, *See Allen v. State Board of Elections,* 393 U.S. 544, 554-57, 89 S.Ct. 817, 825-27, 22 L.Ed.2d 1 (1969) (*Allen*). He has alleged an injury: his request for a bilingual ballot triggered an investigation of his records by the FBI and the INS and an interview by the local District Attorney. Juxtaposed against the holding in *Allen,* however, is the general bar against the invocation of federal equity jurisdiction in criminal prosecutions when the plaintiff is not being prosecuted or threatened with prosecution. *See Linda R.S. v. Richard D.,* 410 U.S. 614, 617-19, 93 S.Ct. 1146, 1148-49, 35 L.Ed.2d 536 (1973); *Younger v. Harris,* 401 U.S. 37, 50-54, 91 S.Ct. 746, 753-55, 27 L.Ed.2d 669 (1971) (*Younger*). In order to

harmonize these conflicting strains of precedent arising in this particular factual circumstance, we find it necessary to focus on the nature of the relief sought by Olagues.

Here, Olagues is not seeking any affirmative injunctive relief in order to permit him to vote, such as demanding that he be listed as an eligible voter. Rather, he seeks to enjoin prosecutorial activities which are focused on persons other than himself. Moreover, it does not appear that Olagues has demonstrated that he would suffer irreparable harm without equitable relief. Unlike the organizations, who allege that their current voter registration efforts are being hindered by the fear that they may possibly be subject to a similar investigation in the future, the possibility that Olagues's voter registration records will be scrutinized again is entirely speculative. Olagues thus faces the barrier of *Lyons,* which emphasizes that the irreparable harm showing is "a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again." 461 U.S. at 111, 103, S.Ct. at 1670.

Under these circumstances, we conclude that Olagues has failed to overcome the prudential limitations on standing that are particularly important when evaluating claims for equitable relief regarding a criminal investigation. The injuries he alleges are insufficient to warrant such an intrusive remedy. Since he is a citizen, it cannot be seriously contended that Olagues has been or will be denied his right to vote as a result of an examination of public records. No official action has been taken against him, other than verifying his citizenship status along with those individuals who were initially identified as improperly registered. The principal claim of present injury is that the investigation has had a "chilling effect" on and "stigmatized" him. However, mere "allegations of a subjective 'chill' " do not suffice to present a justiciable claim. *Laird v. Tatum,* 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26, 33 L.Ed.2d 154

(1972). We need not pass on the "stigma" claim as a basis for standing. The only time it could have arisen was after public disclosure that the investigation was taking place, which apparently was self-induced by the filing of this lawsuit. In the absence of standing to pursue equitable relief, Olagues' individual claim for relief is therefore relegated to one for damages only for any direct injuries which might have occurred as a result of the investigation directed at others. *See Lyons*, 461 U.S. at 111, 103 S.Ct. at 1670 (damage remedy is adequate when there is no showing of future injury).

The organizations' standing requires more extensive analysis. Chinese for Affirmative Action is a voluntary membership group that seeks to protect the rights of Chinese-Americans. It monitors compliance with bilingual election requirements and encourages Asian-Americans to register and to vote. The Hispanic Coalition for Human Rights is an association of Hispanic organizations and persons of Mexican descent, with a goal of securing the civil rights of Hispanics. It encourages them to register and to vote, and advises them on the availability of bilingual election materials. The San Francisco Latino Voter Registration Education Project is a coalition of Hispanic groups that was conducting a voter education and registration drive at the time of the investigation. The organizations allege that the investigation has hindered their efforts to encourage citizens of Hispanic and Chinese ethnic backgrounds to participate in the electoral process and that is was aimed at investigating how they registered voters, thus intimidating them in such activities. They also fear disclosure of their organizational membership. They claim direct injury both to themselves and to their members.

An associational plaintiff has standing to seek redress of direct injury to the organization itself. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S.

26, 27, 40, 96 S.Ct. 1917, 1919, 1925, 48 L.Ed.2d 450 (1976) (*Simon*); *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 2211, 45 L.Ed.2d 343 (1975) (*Warth*); *NAACP v. Button*, 371 U.S. 415, 428, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). Under certain circumstances, an association may also be entitled to seek redress of injury to its members. *See, e.g., Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 342, 97 S.Ct. 2434, 2440, 53 L.Ed.2d 383 (1977) (*Hunt*); Simon, 426 U.S. at 40, 96, S.Ct. at 1925; *Warth*, 422 U.S. at 511, 95 S.Ct. at 2211; *Sierra Club v. Morton*, 405 U.S. 727, 739, 92 S.Ct. 1361, 1368, 31 L.Ed.2d 636 (1972) (*Sierra Club*). In *Hunt*, the Supreme Court established a three-part test to determine whether an association has standing: (1) either the group or its members must have suffered some direct, cognizable injury; (2) the interests the group seeks to protect must be "germane to the organization's purpose"; and (3) the claim or relief sought must not require the participation of the individual members in the suit. 432 U.S. at 343, 97 S.Ct. at 2441. A mere "abstract concern," *Simon*, 426 U.S. at 40, 96, S.Ct. at 1925, or "special interest" in a public issue, *Sierra Club*, 405 U.S. at 739, 92 S.Ct. at 1368, however, is legally insufficient to confer standing.

The organizations claim standing on two grounds. First, they assert a direct injury: their voter registration and educational efforts have been hindered as the direct result of the challenged investigation, in violation of their first amendment and associational rights. They claim that the investigation has discouraged members from participating in their associational activities and that it will lead to disclosure of organizational membership, thus undermining their voter education and registration efforts. Because the investigation involved questioning of voter registrants

as to who had assisted them in registering, they contend, it inherently delved into their associational activities and membership in violation of their constitutional rights.

Second, the organizations assert that both they and their members are threatened with possible prosecution for violations of the Voting Rights Act. They cite Russoniello's letter as evidence that such prosecution was possible. They further assert that they are undoubtedely the targets of Russoniello's investigation and may be charged with improperly influencing ineligible persons to register.

A preliminary issue is whether the investigation may be fairly characterized as having been "targeted" at these organizations or their members. The investigation sought to determine whether there existed any unlawful conspiracies to register ineligible foreign-born voters. The random sample of voters employed focused solely on foreign-born registrants who sought bilingual ballots. Russoniello's letter indicates that groups targeting citizens of Chinese and Hispanic ethnic backgrounds were the source of his concern. Although he stated that he did not challenge their right to conduct registration drives, he did not disavow future prosecutions against persons conspiring to register noncitizens. When any voter whose name was chosen at random initially appeared to be unqualified, he sought follow-up questioning to determine who registered the voter and what representations had been made as to the qualifications necessary to vote. It is not difficult to conclude from this fact that the investigation was sufficiently "targeted" at the organizations and their members for purposes of our analysis. Their principal activities were directed specifically at registering and counseling voters who would fall within the classification on which the investigation was based. That they were not specifically named as targets does not change this conclusion.

We now analyze these organizations' standing under *Hunt*'s three-part test. The first hurdle is whether the groups or their members may have suffered any direct, cognizable injury. We concede that the organizations' allegations raise sufficient claims of potential direct injury to both themselves and their members. The Supreme Court has recognized previously that a group may have standing even if it is only derivatively injured as the result of the prosecution or threat of prosecution of its members. *See Allee v. Medrano*, 416 U.S. 802, 829-30 & n. 6, 94 S.Ct. 2191, 2207 & n. 6, 40 L.Ed.2d 566 (1974) (Burger, J., concurring in part and dissenting in part). In the case before us, the organizations' voter education and the registration efforts are unquestionably protected from unwarranted interference by prosecutorial officials; whether the investigation actually involved any unwarranted intrusions into their associational activities solely affects the merits of their claim, not their standing. Moreover, unlike Olagues, members who participated in the organizations' counseling activities and voter registration drives are potential targets of future prosecutions. Thus, the bar to invocation of federal equity jurisdiction faced by a plaintiff who is not being prosecuted or threatened with prosecution is not applicable. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

The next inquiry is whether the interests the organizations seek to protect are "germane" to the purposes of the organizations. *Hunt*, 432 U.S. at 343, 97 S.Ct. at 2441. We concluded that they are. The organizations' activities are centered on voter education and registration. Such activities are directly related to the individual members' interests in pursuing counseling and registration of voters free from unwarranted prosecutorial intrusions.

Finally, the relief sought by the organizations does not require the participation of individual members in the suit.

The principal claims are for injunctive and declaratory relief; such equitable relief is particularly suited for group representation. *See Warth*, 422 U.S. at 515, 95 S.Ct. at 2213. Thus, we conclude that the organizations have standing.

IV

Although a case may not be moot, a plaintiff still has the burden of showing that equitable relief is necessary, *see W.T. Grant*, 345 U.S. at 663, 73 S.Ct. at 897, and the mere possibility of future injury is insufficient to enjoin official conduct. Moreover, there must be "a strong showing of abuse" of discretion to overturn a denial of such relief. *Id.* We also keep in mind the Supreme Court's admonition that any injunction regarding government functions is generally only permitted in "extraordinary circumstances," *Rizzo v. Goode*, 423 U.S. 362, 379, 96 S.Ct. 598, 608, 46 L.Ed.2d 561 (1976), as officials should be given the "widest latitude" possible while performing their official duties. *Id.* at 378, 96 S.Ct. at 607.

The organizations seek to enjoin a preliminary investigation of a United States Attorney. The district court dismissed the organizations' complaint on the grounds that "as a matter of law," it lacked "jurisdiction to enjoin or otherwise control" such an investigation. We review the legal question of jurisdiction de novo. *E.g., United States v. Oregon*, 718 F.2d 299, 303 & n. 5 (9th Cir.1983). The district court erred in its ruling that it lacked jurisdiction. *See, e.g, Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir.1978) (*Jett*).

We have recognized, however, that as a general proposition, a district court has no "power to monitor executive investigations before a case or controversy arises." *Jett*, 578 F.2d at 845. *See also United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc) ("courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal

prosecutions"), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965). We emphasized that intrusions into the investigative process of a United States Attorney present "difficult problems of separation of powers." *Jett*, 578 F.2d at 845. We therefore recognized that only in extraordinary circumstances would we entertain an action to enjoin a prosecutor's investigatory activities. *See id.* ("prosecutor may be subject to a suit to enjoin egregiously illegal conduct"). *See also United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.) ("a court may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of [a prosecutor] unless there is a clear basis in fact and law for doing so," because of separation of powers constraints), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977) (*Chanen*).

The organizations alleged that the United States Attorney lacked a resonable basis for initiating the investigations. The district court should therefore have determined whether any extraordinary circumstances were present. Because we may affirm the district court's ruling on any basis fairly presented by the record, however, *see Keniston v. Roberts*, 717 F.2d 1295, 1300 n. 3 (9th Cir.1983), we consider whether there were extraordinary circumstances, *Jett*, 578 F.2d at 845, present requiring injunctive relief. We concluded that no extraordinary circumstances are suggested in the record, as indicated in our discussion in Part V. Because we hold that injunctive relief would not be appropriate, we need not determine whether, as Olagues and the organizations claim, an action for such relief may lie against federal officials under the Act itself.

Other courts have been equally reluctant to intrude into the sphere of prosecutorial authority. *See Reporters Committee for Freedom of the Press v. American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C.Cir.1978) ("Only the most extraordinary circumstances warrant anticipatory judicial involvement in criminal investigations."), *cert.*

denied, 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979) (*Reporters Committee*); *LaRouche v. Webster,* 566 F.Supp. 415, 417 (S.D.N.Y.1983) ("party seeking to enjoin a criminal investigation bears an almost insurmountable burden") (*LaRouche*); *accord In re Grand Jury of the Southern District of Alabama*, 508 F.Supp. 1210, 1214 (S.D.Ala.1980); *In re Grand Jury Subpoena to Central States*, 225 F.Supp. 923, 925 (N.D.Ill.1964).

Only one court has actually found the presence of sufficiently extraordinarily circumstances. In *Pollard v. Roberts*, 283 F.Supp. 248 (E.D.Ark.), *aff'd*, 393 U.S. 14 89 S.Ct. 47, 21 L.Ed.2d 14 (1968) (per curiam), the district court enjoined the enforcement of a subpoena requiring the disclosure of contributions to a political party. Such disclosure of what was then considered confidential data would have resulted in immediate, irreparable harm to the plaintiffs' clear first amendment interests. As a result, the court placed a minimal burden on the prosecutor to show that the subpoena was rationally related to a legitimate investigation, 283 F.Supp. at 256, a burden that he failed to meet. *Id.* at 257.

Courts have rejected attempts to interfere with an investigation by a United States Attorney in two similar instances. In *LaRouche*, contributors and organizations supporting a Congressman sued for injunctive and declaratory relief in regard to an investigation into his campaign. The investigation was triggered by a series of newspaper stories indicating potentially illegal campaign financing activities. Plaintiffs argued that the investigation was in bad faith with the intention of both chilling the plaintiffs' exercise of their first amendment rights of association and discouraging future contributions. The United States Attorney's activities had been limited to questioning various contributors. After noting the "almost insurmountable burden" plaintiffs faced, the district court emphasized that: "The decision to investigate, like the de-

cision to prosecute, is one which the Constitution places in the executive branch. The constitutional separation of powers prevents the courts from interfering with the exercise of prosecutorial discretion except under the rarest of circumstances." 566 F.Supp. at 417. That court limited its review to a determination of whether there was "reasonable cause to believe that criminal activity may have taken place." *Id.* at 418. Beyond that, the court held that it was not its function to examine the "wisdom" or "motives" behind the decision to investigate. *Id.* In denying all of plaintiff's claims for relief, the court found that the mere "*possibility* of criminal activity" as alleged in the newspaper articles was "sufficient to justify a criminal investigation." *Id.* Because the plaintiff made no showing of future investigatory misconduct, an injunction with respect to future investigations was also denied. *Id.* at 419. As to the fear that first amendment rights were being chilled, the court emphasized that the "compelling governmental interest in investigating possible" crime overrode such interests and that "the mere asking of material questions does not constitute a First Amendment violation." *Id.* at 418. *See also Jones v. Unknown Agents of the Federal Election Commission,* 613 F.2d 864, 877-78 (D.C.Cir.1979) (reasonable questioning by Commission agents about campaign contributions does not chill first amendment rights), *cert. denied*, 444 U.S. 1074, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980).

Reporters Committee involved two newspapers which sought injunctive and declaratory relief from a telephone company policy of providing toll call records to law enforcement officials, claiming first and fourth amendment violations. The court held that the first amendment provided no additional "shield" respecting privacy interests beyond the fourth amendment's protection in the context of a good faith criminal investigation. 593 F.2d at 1054-55, 1058. The court emphasized the "particularly

heavy burden" on plaintiffs demanding equitable relief in such circumstances dictated by separation of powers concerns, *id.* at 1065, and that mere speculation as to irreparable harm would not suffice. *Id.* at 1067. In order to meet the burden plaintiffs would have to establish "a *clear and imminent* threat of future [prosecutorial] misconduct." *Id.* at 1071.

V

Plaintiffs urge that the preliminary investigation in this case should be reviewed by this court with "heightened scrutiny" because it focused on a "suspect class" and because a fundamental right is burdened. We disagree.

Initially, the organizations argue that a classification based on an individual's choice of language is a form of discrimination based on race or national origin. No court has yet held that a language-based classification is the equivalent of one based on race or national origin requiring heightened scrutiny as a "suspect class." Indeed, those courts which have faced this issue have held that language-based classifications are not the equivalent of national origin classifications. *See Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir.1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 1713, 80 L.Ed.2d 186 (1984); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir.1975); *see also Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir.1980) ("Neither [Title VII] nor common understanding equates national origin with the language one chooses to speak."), *cert. denied*, 449 U.S. 1113, 101 S.Ct. 923, 66 L.Ed.2d 842 (1981). We agree with these courts and hold that a language-based classification is not the equivalent of a national origin classification, and does not denote a suspect class.

Unlike race, place of birth, or sex, language is not one of those "immutable characteristic[s] determined solely by the accident of birth" which typically are the basis for finding a suspect class. *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973). Although our first choice of language may be initially de-

termined to some extent "by the accident of birth," *id.*, we remain free thereafter to choose another should we decide to undertake the initiative. Indeed, bilingualism or multilingualism is hardly an extreme rarity today, as Olagues's own bilingualism exemplifies. Moreover, even if a significant percentage of those speaking a particular language can be shown to be of one "discrete and insular" racial or ethnic minority, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 783 n. 4, 82 L.Ed. 1234 (1938), not all persons speaking that language would be so situated. The court would thus face the problem of blurred lines defining those persons entitled to heightened protection from use of the challenged classification, with the possibility of overbroad protection leading to the striking down of otherwise rationally based official action. The organizations' request therefore urges us "to extend its most exacting scrutiny to review [government action] that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor" of language. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16 (1973). We agree that within a society "of multitudinous origins, customs, tongues, beliefs, and cultures, . . . [i]t would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." *Sugarman v. Dougall*, 413 U.S. 634, 657, 93 S.Ct. 2842, 2865, 37 L.Ed.2d 853 (1973) (Rehnquist, J., dissenting), We therefore decline to equate one's choice of language with one's race or national origin, classification on the basis of which would require exacting scrutiny.

Heightened scrutiny is also appropriate if a fundamental right is burdened, and voting is considered a fundamental right. *E.g., Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 999, 31 L.Ed.2d 274 (1972). It is difficult to see how any "burden" was placed on anyone's right to vote, however, since no individual citizen was

was denied his right to vote. Russoniello's preliminary inquiry was aimed at ferreting out potential voting fraud, in order to enchance the right to vote of those who qualified. Individual citizens who were initially identified as not qualified thereafter were only the subject of narrowly confined, noncoercive follow-up interviews probing potentially unlawful activities of others. Even if we construe this as a "burden," it is a burden that all citizens must be asked to bear when they are potential witnesses to unlawful conduct.

The organizations' first amendment claims are equally lacking in substance. Whatever incidental burden (if any) on their associational rights which may have occurred must give way to the government's need to ensure the sanctity of the polls. *See, e.g., LaRouche,* 566 F. Supp. at 418 ("associational rights . . . [often] must give way to compelling governmental interests in investigating possible criminal activity"). Investigative activity inherently "affects or 'implicates' First Amendment activity." *Reporters Committee,* 593 F.2d at 1059 (emphasis omitted). The review of public records cannot involve any violation of first amendments rights. Moreover, the follow-up questioning of potential witnesses also is lawful. *See, e.g., Jones v. Unknown Agents of the Federal Election Commission,* 613 F.2d 864, 877-78 (D.C. Cir. 1979) (upholding questioning of campaign contributors regarding illegal contributions), *cert. denied,* 444 U.S. 1074, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980); *LaRouche,* 566 F. Supp. at 418 ("As long as reasonable cause to investigate exists, the mere asking of material questions does not constitute a First Amendment violation.")

When no "suspect class" is involved and no fundamental right is burdened, a rational basis test is used to determine the legitimacy of the classification. *See Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 311-12, 96

S.Ct. 2562, 2565-66, 49 L.Ed.2d 520 (1976) (per curiam). Here, the scope of the investigation was limited to recently-registered foreign-born voters seeking bilingual ballots. The impetus for the investigation was a study indicating problems with persons whose primary language was other than English, in part because of mistranslations in the Spanish language applications. The initial review was randomly based among this group in order to readily obtain some indication of the scope of any impropriety. When no significant level of impropriety was noticed, the investigation was terminated. Thus, it appears to have been reasonably limited in both its scope and its use of classifications.

We realize that the separation of powers doctrine does not require us to ignore any and all activities by executive officials regardless of whether their actions constitute clear violations of individual rights. At the same time, however, even the organizations recognize that a United States Attorney is entitled, indeed required, to conduct an investigation into allegations of voting fraud. They only quarrel with the scope and manner of the investigation subsequently undertaken. But ours is not the role of a "super prosecutor" empowered to monitor all prosecutorial activities on a day-to-day basis, absent compelling, extraordinary circumstances. *Chanen,* 549 F.2d at 1312-13.

We only hold that on the facts of this case, no such extraordinary circumstances exist warranting intrusion into the actions of the executive branch. This is not to say that the organizations' charges are not serious; we reach this conclusion only after careful scrutiny of the record before us. We are compelled, however, to refrain from injecting ourselves into the midst of what essentially was only an embryo of an investigation. A narrowly focused preliminary inquiry using public records was undertaken in order for the United States Attorney to determine

whether a problem even existed. Without the ability to make such a narrow inquiry, in the face of a study indicating potentially significant voter registration problems, the United States Attorney would be deprived of the information he needs to perform his duties. The organizations would have us either forbid any preliminary investigation, or mandate one of significantly broader scope. But matters such as the scope of a preliminary investigation are delegated to the sound discretion of the executive branch.

VI

The organizations also sought declaratory relief. The district court dismissed this claim without elaborating its reasons. The decision whether to grant declaratory relief is within the sound discretion of the district court. *See, e.g., Doe v. Gallinot,* 657 F.2d 1017, 1024-25 (9th Cir. 1981).

Declaratory relief may be appropriate even when injunctive relief is not. *See Steffel v. Thompson,* 415 U.S. 452, 469, 94 S.Ct. 1209, 1220, 39 L.Ed.2d 505 (1974) (*Steffel*). There is a considerable difference between *ordering* a government official to conduct his activities in a certain manner, and simply *pronouncing* that his conduct is unlawful and *should* be corrected. Nevertheless, there remains the concern that an award of declaratory relief in favor of the organizations could later provide grounds for seeking injunctive relief against the same officials should the organizations believe they are again the targets of a similar investigation, *see Samuels v. Mackell,* 401 U.S. 66, 72, 91 S.Ct. 764, 767, 27 L.Ed.2d 688 (1971) (*Samuels*), even though the investigative techniques may not be identical. Therefore, if declaratory relief based on a lesser showing leads to an injunction, the distinction between the two types of relief would be lost, despite the strong policy disfavoring such disruptive relief which we previously outlined. *See Steffel,* 415 U.S. at 481-82 & n. 3, 94 S.Ct. at

1226-27 & n. 3 (Rehnquist, J., concurring) (expressing concern over potential use of declaratory relief as a bootstrap).

Thus, the Supreme Court has recognized that "ordinarily a declaratory judgment will result in precisely the same interference with and disruption of" law enforcement activities as an injunction, *Samuels,* 401 U.S. at 72, 91 S.Ct. at 767, and therefore " 'the practical effect of [injunctive and declaratory] relief will be virtually identical.' " *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931, 95 S.Ct. 2561, 2567, 45 L.Ed.2d 648 (1975), *quoting Samuels,* 401 U.S. at 73, 91 S.Ct. at 768. Notwithstanding the difference in effect between injunctive and declaratory relief, we conclude that the same general equitable principles should apply here in determining whether to grant declaratory relief as to the lawfulness of Russoniello's investigation. *See Samuels,* 401 U.S. at 73, 91 S.Ct. at 768.

The central purpose of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, is to provide parties with a declaration of their rights prior to incurring actual injury. In the typical case requesting declaratory relief with respect to law enforcement officials, a declaration of rights is sought with respect to a party's ongoing or intended conduct in light of existing criminal statutes. The party desires a declaration that his conduct is lawful, and therefore may not be interfered with by state or federal officials. *See Steffel,* 415 U.S. at 478, 94 S.Ct. at 1225 (Rehnquist, J., concurring). Declaratory relief thus provides an "alternative to pursuit of the arguably illegal activity." *Id.* at 480, 94 S.Ct. at 1226. Here, however, there is no claim seeking a declaration that the organizations' voter registration activities are lawful. Rather, they seek a declaration that the government's activities are unlawful. Thus, the organizations are not seeking any alternative to being forced to continue arguably lawful conduct with the

fear of imminent criminal prosecution. *E.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

In these circumstances, we hold that the district court's denial of declaratory relief was not an abuse of discretion. The organizations were not generally hindered from pursuing their lawful voter registration activities at the risk of imminent criminal prosecution, unlike the restaurant owners in *Doran*. Declaratory relief in this action would raise the same concerns regarding interference with the activities of prosecuting officials that we pointed out in our discussion of injunctive relief.

VII

The separation of powers concerns with regard to equitable relief against a United States Attorney are absent when examining the appropriateness of equitable relief against the county officials. But similar considerations of restraint in ordering such relief arise out of principles of comity and federalism, as emphasized in *Lyons, O'Shea,* and *Younger*. "[R]ecognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws. . . ." *Lyons,* 461 U.S. at 112, 103 S.Ct. at 1670, *citing O'Shea,* 414 U.S. at 499, 94 S.Ct. at 677, *and Younger,* 401 U.S. at 46, 91 S.Ct. at 751. "[N]ormal principles of equity, comity, and federalism . . . should inform the judgment of federal courts when asked to oversee state law enforcement authorities." *Lyons,* 461 U.S. at 112, 103 S.Ct. at 1670. Here, the actions of the county officials of which the organizations complain were all performed at the *specific request* of the United States Attorney. Enjoining the county officials' activities would thus, to some effect, enjoin the United States Attorney from pursuing his investigation. Because we find no basis

for interfering with the United States Attorney's investigation, we find no basis for equitable relief concerning the means he has to conduct it. *Cf. Gravel v United States,* 408 U.S. 606, 621, 92 S.Ct. 2614, 2625, 33 L.Ed.2d 583 (1972) (committee counsel gathering information for congressman is entitled to invoke congressional immunity).

Even absent these concerns, the organizations' claims under the Voting Rights Act against these officials do not appear to have merit. Assuming that the search of voting records intimidated bilingual voters, such intimidation would satisfy only one part of a two-pronged test for violations of 42 U.S.C. §§ 1971(b) and 1973i(b): the voters and organizations were intimidated, but the officials did not *intend* to intimidate. *See United States v. McLeod,* 385 F.2d 734, 740-41 (5th Cir. 1967). As we discuss in Part IX, the officials acted in good faith. Although a declaratory judgment for violation of 42 U.S.C. § 1973aa-1a could not be denied on the basis of intent, *see Chinese for Affirmative Action,* 580 F.2d at 1008-09 (good faith is no defense to equitable relief regarding bilingual ballot provisions), there has been no violation of this section, which concerns solely the provision of bilingual ballots. There has been no allegation that bilingual ballots have not been provided in accordance with that section.

VIII

The organizations' First Amended Complaint seeks "statutory damages" under the Voting Rights Act. Pursuant to *Allen v. State Board of Elections,* 393 U.S. 544, 555, 89 S.Ct. 817, 826, 22 L.Ed.2d 1 (1969), private litigants are held to have an action against state officials for declaratory and injunctive relief under section 5 of the Act, 42 U.S.C. § 1973c.

The Act, however, does not specify any statutory damage remedies. No case has been cited nor have we found one in which damages were recovered. In deter-

mining whether to construe an implied cause of action, the principal focus must be on congressional intent. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,* 456 U.S. 353, 377, 102 S.Ct. 1825, 1838, 72 L.Ed.2d 182 (1982). The Act itself limits the recovery of any fine for criminal sanctions to $5,000. *See* 42 U.S.C. *8* [*sic*] 1973aa-3. The legislative history nowhere suggests any action for damages, but instead observes that a private litigant is entitled to "the same remedy" as the Attorney General, as well as attorneys' fees as in 42 U.S.C. §§ 1981-1988. S.Rep. No. 295, 94th Cong., 1st Sess. 39-43, *reprinted in* 1975 U.S. Code Cong. & Ad.News 774, 806-10. That history points out that "[t]he sole consequence" of the provision for a private cause of action under the Act "is to broaden the scope of *equitable* relief which may be requested" to include the "special remedies" specified in the Act. *Id.* at 49, *reprinted in* 1975 U.S. Code Cong. & Ad.News at 816 (emphasis added).

Moreover, Supreme Court precedent suggests that private plaintiffs are limited to damage actions under 42 U.S.C. § 1983. *See Smith v. Allwright,* 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed.2d 987 (1944). In *Smith,* plaintiffs were awarded damages for violation of their voting rights under 8 U.S.C. § 31 (now echoed in 42 U.S.C. § 1973), in a suit under 8 U.S.C. § 43 (now codified at 42 U.S.C. § 1983). Equitable relief suffices to fulfill the purpose of the statute, which is to ensure the right to register and vote at the poll. See, *e.g., Webber v. White,* 422 F. Supp. 416, 426 (N.D. Tex. 1976) ("the most relief that a federal district court can grant to a private litigant under the *Allen* interpretation of 42 U.S.C. §1973c" is declaratory and injunctive relief). We decline to imply any action for damages.

IX

There is also an issue of whether the organizations' complaint can be read fairly to include a request for damages based on constitutional claims or statutory claims such as

section 1983, 42 U.S.C. § 1983. We agree with the district court, however, that the officials involved in this action would be entitled to immunity from such damage claims.

Under *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), state prosecutors are absolutely immune from damage suits with respect to their quasi-judicial activities. Federal prosecutors receive the same protection. *Butz v. Economou,* 438 U.S. 478, 516-17, 98 S.Ct. 2894, 2915-16, 57 L.Ed.2d 895 (1978). Other executive officials are entitled to qualified immunity, *see. e.g., Scheuer v. Rhodes,* 416 U.S. 232, 247-49, 94 S.Ct. 1683, 1691-92, 40 L.Ed.2d 90 (1974) (state executive officials), as are prosecutorial activities that are merely administrative or investigative. *Jacobson v. Rose,* 592 F.2d 515, 524 (9th Cir. 1978), *cert. denied,* 442 U.S. 930, 99 S.Ct. 2861, 61 L.Ed.2d 298 (1979).

We have previously employed *Imbler's* functional approach for determining the degree of immunity for prosecutorial activity. *See Ybarra v. Reno Thunderbird Mobile Home Village,* 723 F.2d 675, 678 (9th Cir. 1984). Quasi-judicial activities are not limited to post-indictment matters, but also include "[i]nvestigative functions carried out pursuant to the preparation of a prosecutor's case." *Freeman on Behalf of the Sanctuary v. Hittle,* 708 F.2d 442, 443 (9th Cir. 1983) (per curiam). See also *Atkins v. Lanning,* 556 F.2d 485, 488-89 (10th Cir. 1977) (per curiam).

The district court held that the actions in question were investigatory rather than prosecutorial in nature. The limited investigative activities undertaken by Russoniello, however, may be encompassed within those activities essential to the initiation of a prosecution. His decision to request a sampling of voting records can hardly be described

as a purely administrative act. The Third Circuit has highlighted this aspect of a prosecutor's duties:

> We recognize that the decision of the Attorney General, or a prosecuting attorney, to initiate a prosecution is not made in a vacuum. On occasion, the securing of additional information may be necessary before an informed decision can be made. To grant a prosecuting attorney absolute immunity over his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make the decision would only foster uninformed decisionmaking and the potential for needless actions. We believe the right to make the decision without being subject to suit must include some limited right to gather necessary information.

Forsyth v. Kleindienst, 599 F.2d 1203, 1215 (3d Cir. 1979), *cert. denied,* 453 U.S. 913, 101 S.Ct. 3147, 69 L.Ed.2d 997 (1981).

We need not determine whether the district court erred in denying absolute immunity, because we agree that all those sued are entitled at least to qualified, good faith immunity. The controlling standard is "the objective reasonableness of an official's conduct, as measured by reference to clearly established law." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738,73 L.Ed.2d 396 (1982). Moreover, summary judgment is encouraged as an appropriate tool to "avoid excessive disruption of government." *Id.*

Under this objective standard, all the officials are entitled to immunity. The county officials did no more than submit information in the public record to the United States Attorney at his request, with some later, voluntary interviews of those voters whose citizenship the INS was unable to ascertain. Such actions do not violate any "clearly established" rights. Examining information in the public record violates no one's rights. The Northern District

Director of the INS, David Ilchert, similarly did no more than provide information to Russoniello that was available to anyone on request.

Russoniello's actions were limited to conducting a preliminary investigation of potential voting fraud by examining and cross-checking public records. The limited scope of the investigation was reasonably related to his need to secure a preliminary indication of the scope of potential illegalities. No further activities were undertaken or contemplated. These actions also violated no individual's "clearly established" rights; indeed, it was Russoniello's duty to perform this investigation under the Voting Rights Act.

The organizations' claims rest entirely on their contention that an investigation using a language-based classification to define its scope is subject to strict scrutiny as invidious discrimination on the basis of national origin. This contention is further dependent upon a finding that the illegality of using such a classification was "clearly established." *See Capoeman v. Reed,* 754 F.2d 1512, 1514 (9th Cir. 1985) (establishing framework for determining whether a right was clearly established for purposes of qualified immunity). We already have concluded that such a classification does not call for strict scrutiny. But even if it did, the illegality of such a classification was not "clearly established." The district court's order finding qualified immunity for all federal and state officials sued is therefore affirmed.

AFFIRMED.

NELSON, Circuit Judge, concurring and dissenting:

I agree that the controversy is not moot (section II), that the organizations have standing (section III), and that the defendants are entitled to good faith immunity from damages under 42 U.S.C. § 1983 (section IX). I dissent from the holdings that Olagues lacks standing (part of section III), that "extraordinary circumstances" are required

to enjoin an investigation that infringes upon First Amendment rights (section IV), that heightened scrutiny is not warranted for the equal protection claim (section V), that declaratory and injunctive relief should be judged under the same standards (section VI), and that the plaintiffs have no claims under the Voting Rights Act (sections VII and VIII). I would remand on the injunction and one Voting Rights Act claim, and reverse the denial of a declaratory judgment which provides that the investigation violated the Equal Protection Clause. For clarity and brevity, I will limit my comments on this complex case to these issues.

Standing should not be denied to Olagues. Neither rationale employed by the majority is convincing. The prudential analysis speaks of "equitable relief" but then considers solely the request for an injunction, ignoring the declaratory relief sought. The majority concedes that Olagues has alleged an injury, but then categorizes the harm as "subjective" and therefore nonjusticiable under *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). Yet *Laird* recognizes that when the complainant is subject to the challenged exercise of government power, whereby the government improperly imposed an affirmative obligation likely to have a deterrent effect on the exercise of his rights, *Lamont v. Postmaster General*, 381 U.S. 301, 308, 85 S.Ct. 1493, 1497, 14 L.Ed.2d 398 (1965), the requirements of standing are met. *Laird*, 408 U.S. at 11-13, 92 S.Ct. at 2324-25 (citing *Lamont*).

Olagues satisfies the requisites of standing under the very case upon which the majority relies. *See McMichael v. County of Napa*, 709 F.2d 1268, 1269-70 (9th Cir.1983). The burden which Olagues alleges upon his exercise of the franchise—that his request for a bilingual ballot triggered an investigation of him by the INS, the FBI, and the United States Attorney, and an interview with the local District Attorney at which he was to prove his citizen-

ship—is concrete. He has a personal stake in the controversy and the relief requested would prevent the injury from recurring. Moreover, the majority's suggestion that any stigma attributable to the government's action was Olagues' own fault, because all publicity concerning the investigation resulted from the filing of this lawsuit, has neither legal support nor a factual basis in the record.

The majority accords standing to the organizations because the investigation threatened their members. The identical threat is posed to the group of voters to which Olagues belongs—Hispanic citizens who request bilingual ballots. This language minority group is explicitly protected against voting discimination. *See* 42 U.S.C. § 1973b(f)(2). The injury to Olagues as a member of this group is another ground for his standing under the Equal Protection Clause. *See United Jewish Organizations of Williamsburgh, Inc. v. Wilson*, 510 F.2d 512, 522 (2d Cir.1975).

The majority misstates the standard for injunctive relief in this context. Instead of the "extraordinary circumstances" threshold, drawn from federalism and criminal cases,[1] this investigation should have been enjoined if it lacked a reasonable basis or was initiated in bad faith. *See*

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[1] See *Rizzo v. Goode*, 423 U.S. 362, 379, 96 S.Ct. 598, 608, 46 L.Ed.2d 561 (1976) (federalism issues in injunction of municipal police); *Jett v. Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978) (no immediate controversy on discovery until prosecution had commenced); *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.) (prosecutor's choice of evidence to present to grand jury), *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc) (United States Attorney arrested for contempt for refusing to sign a grand jury indictment), *cert. denied*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed. 2d 700 (1965); *In re Grand Jury of the Southern District of Alabama*, 508 F.Supp. 1210, 1214 (S.D.Ala. 1980) (prosecutorial vindictiveness); *In re Grand Jury Subpoena to Central States*, 225 F.Supp. 923, 925 (N.D. Ill. 1964) (motion to quash grand jury subpoenas).

Branzburg v. Hayes, 408 U.S. 665, 699-701, 707-08, 92 S.Ct. 2646, 2665-2666, 2669-2670, 33 L.Ed.2d 626 (1972); *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph*, 593 F.2d 1030, 1064 (D.C.Cir.1978), *cert. denied*, 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed.2d 639 (1979); *Pollard v. Roberts*, 283 F.Supp. 248, 256-58 (E.D.Ark.), *aff'd*, 393 U.S. 14, 89 S.Ct. 47, 21 L.Ed.2d 14 (1968) (*per curiam*). The First Amendment protects citizens from investigations which do not meet this "reasonable basis" standard. *Pollard*, 283 F.Supp. at 258; *Reporters Committee*, 593 F.2d at 1064. *See also Branzburg v. Hayes*, 408 U.S. 665, 699-01, 707-08, 92 S.Ct. 2646, 2665-66, 2669-70, 33 L.Ed.2d 626 (1972).

The organizations alleged that the United States Attorney lacked a reasonable basis for initiating the investigations. The district court should have made a finding on this issue. *See La Rouche v. Webster,* 566 F. Supp. 415, 418 (S.D.N.Y. 1983); *Pollard,* 283 F. Supp. at 258. The relief sought by the organizations was not anticipatory, since the investigation presented a current case or controversy. *Cf. Jett v. Castaneda,* 578 F.2d 842, 845 (9th Cir. 1978) (no case or controversy); *Reporters Committee,* 593 F.2d at 1065. The denial of the preliminary injunction should be affirmed, therefore, only if the organizations failed to show that the investigation was not reasonable or initiated in bad faith. The question should be remanded.

Contrary to the majority's view, declaratory relief raises different concerns than an injunction. To quote one case cited by the majority, "critical distinctions make declaratory relief appropriate where injunctive relief would not be." *Steffel v. Thompson,* 415 U.S. 452, 481, 94 S.Ct. 1209, 1226, 39 L.Ed.2d 505 (1974) (Rehnquist, J., concurring). The majority echoes the mistake of the panel which was reversed in *Steffel* for holding that a failure to demonstrate irreparable injury precluded the granting of declaratory relief. *Id.* at 471-72, 94 S.Ct. at 1221-22. It

reasons that where injunctive relief is inappropriate, declaratory relief should also be denied, because "an award of declaratory relief in favor of the organizations could later provide grounds for seeking injunctive relief against the same officials should the organizations believe they are again the targets of a similar investigation." This concern in misplaced, because an injunction *should* issue if the government so flouts a judgment declaring certain action unconstitutional. Declaratory relief is a separate remedy to be awarded when warranted, even if an injunction under the same circumstances would be denied. *Steffel,* 415 U.S. at 471-72, 94 S.Ct. at 1221-22.

This case warrants the award of a declaratory judgment under the Constitution. The investigation fails before the scrutiny required for a classification which burdens the voting rights of a suspect class.

The majority recognizes that the investigation targeted "recently registered, foreign-born voters who requested bilingual ballots," at ____, but then analyzes the class as if it were defined solely by language ability. The classification was of those who requested bilingual ballots, not just of individuals who speak more than one language, and it included two other factors—foreign birth and recent registration to vote. The class should be analyzed as defined by these *three* characteristics.

Foreign birth is "an immutable characteristic determined solely by an accident of birth," *Frontiero v. Richardson,* 411 U.S. 677, 686, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973), and is similar to a national origin classification. Together with the requirement of recent registration, the target class appears composed of immigrants who have recently obtained United States citizenship but prefer Spanish or Chinese-language ballots. Like the class of Hispanics in *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866 (1954), these characteristics taken together define a suspect class. The investigation

by the FBI and INS, together with the interviews requiring proof of citizenship, amount to "different treatment" of these citizens. Such additional requirements imposed on voters "solely because of their ancestry are by their very nature odious to a free people." *Hirabayashi v. United States,* 320 U.S. 81, 100, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774 (1943).

The fundamental right to vote was burdened by this investigation. The majority finds otherwise, perhaps because it equates "burden" with outright denial of the right to vote. Precedent does not define "burden" so narrowly, however. *See, e.g., Harper v. Virginia Board of Elections,* 383 U.S. 663, 666-67, 86 S.Ct. 1079. 1081, 16 L.Ed.2d 169 (1966) (poll tax constitutes burden). Nor is "denial" of the right to vote the only behavior prohibited under the Voting Rights Act. *See* 42 U.S.C. § 1973 ("no voting qualification or prerequisite to voting, or standard, practice, or procedure . . . to deny or abridge . . ."); 42 U.S.C. § 1973i(b) ("intimidate, threaten, or coerce").

The opinion states that "it is difficult to see how any 'burden' was placed," but I do not share this difficulty. An investigation by the FBI and INS and a summons to the district attorney to prove one's citizenship, as I noted above concerning the injury to Olagues, constitutes a burden on the exercise of the right to vote *in this case.* The impact of the investigation of the class went beyond any ordinary inconvenience caused to witnesses. These individuals are not fluent in English, are new to this country, and through their recent acquisition of citizenship have experienced the INS bureaucracy, which misrepresented the citizenship status of more than half of those investigated. When a citizen's request for a bilingual ballot—which is specifically made available by Congress to eliminate voting discrimination against those more comfortable in another language, *Chinese for Affirmative Action v. Lequennec,* 580 F.2d 1006, 1008 (9th Cir. 1978), *cert.*

denied, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979)—triggers such consequences, a burden has been imposed. The Voting Rights Act forbids intimidation of voters, and in my view this investigation intimidated those foreign-born, recently registered voters who requested bilingual ballots.

Having examined the character of the classification in question and the importance of the individual interests at stake, *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 183, 99 S.Ct. 983, 989, 59 L.Ed.2d 230 (1979), we examine the interests asserted in support of the classification. *Id.* The classification must be necessary to serve a compelling interest, and it must employ the least drastic means to achieve that end. *Id.* at 184-85, 99 S.Ct. at 990. This investigation cannot withstand such scrutiny. It was not narrowly tailored to catch those wrongly registered, because it targeted recently registered citizens, who are required by law to be literate in English. It assumed that individuals who speak Spanish or Chinese are likely not to be citizens, though the statistical predominance of Spanish—and Chinese-speaking citizens is the very reason why provision of bilingual ballots was required under federal law. The investigation was unconstitutional under the Equal Protection Clause, and a declaratory judgment should be granted.

Relief may also be required under the Voting Rights Act. I would remand the issue of potential violation of 42 U.S.C. § 1973aa-1a. *See Lequennec*, 580 F.2d at 1008-09. Good faith is not a defense under this provision, which does not require intent to discriminate. *Id.*

Finally, even absent its legal infirmities, this investigation violated the spirit behind the Voting Rights Act, which charges the Attorney General with eradicating discrimination against language minority voters and discrimination based upon national origin. Instead, this U.S. Attorney's efforts *engendered* such discrimination. I cannot join the majority's wholesale affirmance of the district court's judgment.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 82 2102 SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS

[Filed Sept. 14, 1983]

ORDER

IT IS HEREBY ORDERED THAT:

1) Plaintiffs' motion to amend is DENIED;

2) Plaintiffs' motion concerning Section 5 of the Voting Rights Act is DENIED;

3) Defendants' motions for summary judgment are GRANTED. Judgment shall be entered for all defendants.

Date: SEP 12, 1983

/s/ SPENCER WILLIAMS

United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 82 2102 SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS

[Filed Sept. 14, 1983]

JUDGMENT

IT IS HEREBY ORDERED that judgment shall be entered in the above-captioned matter for defendants.

Date: SEP 12, 1983

/s/ SPENCER WILLIAMS
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 82 2102 SW

JOSE J. OLAGUES ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS

[Filed Sept. 14, 1983]

MEMORANDUM IN SUPPORT OF ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The basic facts of this case are not in dispute. Plaintiffs, individuals and groups alike, claim that a recently completed voting fraud investigation conducted by the United States Attorney's Office and the other named defendants violated their civil rights.

Defendant Joseph Russoniello, the United States Attorney for the Northern District of California, initiated the investigation on April 19, 1982 in a letter sent to the district attorneys of nine northern California counties. In the letter, Mr. Russoniello expressed concern over a study conducted by the Santa Clara County District Attorney's Office which indicated that a substantial percentage of recently registered foreign-born individuals were not United States citizens. The study found that all of those improperly registered believed that they were eligible to vote either because they were married to United States citizens or had lived in this country for a lengthy period of

time. Based on this information, Mr. Russoniello expressed concern that certain persons or organizations may have illegally registered these individuals or conspired to registered them in violation of 42 U.S.C. § 1973i(c)(d). He also expressed the opinion that the source of the problem could be the fact that many of those who had registered improperly did not speak English and were thus more susceptible to being misled by improper representations concerning voter eligibility.[1]

Mr. Russoniello expressed further concern that if the illegal registration of non-citizens was widespread, the upcoming June 8th general elections could be subjected to court challenge. While it was too early, in Mr. Russoniello's opinion, to "sound any alarm," he did state that the need existed for a mutual effort to determine the extent of the problem, if in fact one existed at all. Accordingly, he requested the cooperation of local law enforcement officers and voter registrars in obtaining a random sampling of recently registered foreign-born individuals. Since Mr. Russoniello was of the opinion that the problem of illegal registration would arise, if at all, among those who did not understand English, he asked the counties to submit the names and dates of birth of twenty-five newly registered persons whose affidavits of registration reflected (1) a foreign country as the place of birth and

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[1] Shortly after sending this first letter, Mr. Russoniello was told that the registration form's Spanish language admonition concerning citizenship did not accurately translate the English language admonition that a person "must" be a citizen to be able to vote. According to the information given Mr. Russoniello, the Spanish language admonition merely states that a person "should" be a citizen. According to his affidavit, this information further confirmed Mr. Russoniello's suspicion that if irregularities in registration occurred, they would occur most frequently amongst those for whom English was, at best, a second language.

(2) a preference for election materials in a language other than English. After receipt of this sampling, according to the letter, the United States Attorney's Office would endeavor to determine the citizenship of each individual through the records of the Immigration and Naturalization Service (INS). If citizenship could not be determined from these records, the local officials would be asked to contact the individual to determine (1) citizenship and (2) if the individual was not a citizen, who registered him or her.

Mr. Russoniello made it clear in his letter that he had no intention of prosecuting any individual found ineligible to vote but would "seriously consider" prosecuting any individual who deliberately "conspired with another individual for the purpose of encouraging the giving of false information in order to establish the eligibility of any individual to register . . ."

All of the local district attorneys responded positively to the sample request, albeit in varying degrees. Of the names submitted, a total of 168 were subjected to a federal records check including an examination of FBI civil and criminal fingerprint indices, a manual check of the INS records in San Francisco, and a check of the INS central computer bank files in Washington, D.C. The examination disclosed that of the 168 persons, no records existed for 68 of the individuals, 55 were positively identified as citizens, and 45 were identified as not citizens or probably not citizens. Mr. Russoniello conveyed this information to the respective district attorneys along with a request that they conduct interviews of those not positively identified as United States citizens.

Apparently all of the district attorneys conducted these interviews. Some were done in person, others by letter. There is nothing in the record to indicate that these inter-

views rose to the level of an involuntary interrogation nor is there any evidence as to any individual being penalized in any way for refusing to cooperate.

Shortly after the investigation began, plaintiffs initiated suit, claiming the study interfered with their statutorily protected right to participate in the electoral process; discriminated against them on the basis of race and national origin; and deterred the exercise of their First Amendment right to freedom of association. Plaintiffs are Hispanic-American and Chinese-American citizens and organizations who sought to represent a class of similarly situated groups and organizations. Both federal and county officials are named as defendants in the suit, including Mr. Russoniello and David Ilchert, the District Director for the INS.

On May 24, 1982, the court granted the federal defendants' motion to dismiss the injunctive aspects of the suit on the ground that it had no authority to enjoin or otherwise control an ongoing investigation of the United States Attorney's Office. At the same time, the federal defendants' motion to dismiss the compensatory aspects of the suit based on a theory of absolute immunity was denied.

On September 24, 1982, the federal defendants filed a motion for summary judgment as to the remaining claims. The local defendants filed a similar motion on November 3, 1982. Plaintiff filed a countermotion for partial summary judgment on November 30, 1982. On December 15, 1982, at the close of oral argument on all motions, the court granted defendants' motions and dismissed the entire action. The remainder of this memorandum addresses, briefly, the court's reasoning as to one ground for dismissal raised by the defendants—qualified immunity.

II.

Prosecutors enjoy total immunity for acts of initiating or pursuing a criminal prosecution. *Imbler v. Pachtmann,*

424 U.S. 409, 420 (1976). A prosecutor engaged in purely investigatory or administrative activities, however, is entitled only to the qualified "good faith" immunity afforded all public officials. *Jacobson v. Rose*, 592 F.2d 515, 525 (9th Cir. 1978). This court has already determined that the conduct in this case was investigatory, not prosecutorial, in nature. The question, then, is whether the United States Attorney, as well as the remainder of the defendants, is entitled to the protection of the good faith defense.

In the recent case of *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), the Supreme Court clarified the scope of the qualified immunity defense. Prior decisions of the Court had stated that the defense included both subjective and objective elements. Thus, in order to establish liability, a plaintiff needed to show only that the official (1) knew or reasonably should have known that the action taken within his sphere of official responsibility would violate the constitutional rights of the plaintiff (objective) or (2) undertook "the action with malicious intention to cause a deprivation of constitutional rights or other injury . . . ." (subjective), *Wood v. Strickland*, 420 U.S. 308, 322 (1975). If a plaintiff could show either course of conduct, the public official would not be entitled to immunity from damages. The Court in *Harlow, supra*, concluded that the subjective aspect of the defense required the resolution of the public official's motives, an inquiry that too often proved to be disruptive to the government process:

> [I]t is now clear that substantial costs attend the litigation of the subjective good faith of government officials. Not only are there the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service. There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary

> functions. In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions. These variables explain why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government. Id. at 2734.

In an effort to strengthen the defense the *Harlow* Court established three related principles. First, rejecting the previously accepted objective/subjective approach, the Court stated that the inquiry into a particular official's conduct should be strictly objective; evidence of the official's actual state of mind should be considered only in those cases with "exceptional circumstances." *Id.* at 2732-33. By abolishing the subjective aspect of the good faith defense, the Supreme Court expressly encouraged the dismissal of government officials through motions for summary judgment. The Court specifically disapproved of those cases wherein summary judgment was denied because the trial court could not resolve the issue of the particular official's "permissible intentions:"

> The subjective element of the good faith defense frequently has proved incompatible with our admonition in *Butz* [*v. Economou*, 438 U.S. 478, 507-508] that insubstantial claims should not proceed to trial. Rule 56 of the Federal Rules of Civil Procedure provides that disputed questions of fact ordinarily may not be decided on motion for summary judgment.

> And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury. *Id.* at 2732-33.

Accordingly, summary judgment may not be denied, as it may have been in the past, solely on the ground that there remains a triable issue of fact as to the official's subjective state of mind.

The second principle enunciated by the Court is that this objective standard requires the case to be dismissed unless it is shown that the official's conduct violated "clearly established law." *Id.*, at 2733. Finally, the Court encouraged the early grant of summary judgment by holding that "[u]ntil this threshold question is resolve, discovery should not be allowed." *Id.* at 2734.

All of the defendants acted within their official capacities when they participated in the subject investigation. Accordingly, all are entitled to at least assert the qualified immunity defense. What must be decided is whether any of defendants' acts, viewed separately or in combination, violated constitutional or statutory prohibitions which were clearly established at the time of the action.

Before addressing plaintiffs' various federal claims, three preliminary matters should be noted. First, it should be made clear that the individual plaintiffs represent only those *citizens*—both native and naturalized—who were or may be affected by the defendants' conduct. They clearly have no standing to assert the rights of any aliens involved in defendant's study.

Second, contrary to the allegations of plaintiffs, it appears that all of the information provided by the local defendants and the INS is a matter of public record, available to any party upon an appropriate request. Even if it were not publicly available, plaintiffs have not shown

that providing the United States Attorney with this kind of information, in the course of a criminal investigation, violates any clearly established state or federal law.

Third, as discussed, the investigation in question was aimed at determining whether a large number of alien residents were being induced to register under fraudulent misrepresentations. It is undisputed that preventing this kind of election fraud constitutes a formidable and compelling state interest. *Marston v. Lewis*, 410 U.S. 679 (1973); *Burns v. Forston*, 410 U.S. 686 (1973). This is true regardless of whether the fraud involves only isolated incidents of illegal registration or, as in this case, a possible conspiracy to illegally register a sizable number of noncitizens. Faced with evidence indicating the possibility of such a substantial impact on the integrity of the franchise, the United States Attorney has the right, if not the duty, to at least determine the scope of the actual problem and, if necessary, instigate required remedial action.

Of course, the United States Attorney does not have unfettered discretion over the manner in which such an investigation is conducted, at least insofar as he, or others, may be subjected to liability for damages resulting from the investigation. The core of plaintiffs' complaint lies not with the fact of such an investigation but with the defendants' chosen methodology. We therefore turn to these objections, keeping in mind the limitations imposed by *Harlow, supra*, and its predecessors.

III.

Plaintiffs claim that the subject investigation impinged upon their fundamental right to participate in the electoral process and discriminated against them on the basis of race or national origin—both suspect classifications—in violation of their equal protection rights.

In the recent case of *Plyer v. Doe*, 457 U.S. 202, 216-17 (1982), Justice Brennan, speaking for the majority of the court, made the following observations concerning the Equal Protection Clause of the Fourteenth Amendment:

> The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). But so to, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accomodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some relationship to a legitimate purpose.
>
> But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a "suspect class," [footnote omitted] or that impinge upon the exercise of a "fundamental right" [footnote omitted]. With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that i[t]s classification has been precisely tailored to serve a compelling state interest.

The Fourteenth Amendment speaks only in terms of state action. The Fifth Amendment Due Process Clause, however, has been interpreted as imposing an equal protection limitation on federal conduct. *See, Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

As to the right to vote, plaintiffs concede that the prevention of election fraud presents a compelling state interest which may justify certain limitations on the right's exercise. *Burns v. Forston, supra; Marston v. Lewis, supra; Dunn v. Blumstein*, 405 U.S. 330 (1972). Plaintiffs argue however that these cases are inapplicable to the instant action since no election fraud or criminal violation of the election laws was ever uncovered. The Court has never held, however, that there must be actual fraud or even evidence of fraud. Instead, in the context of residency requirements, the Court has found that "[s]tates have valid and sufficient interests in providing for *some* period of time—prior to an election—in order to prepare adequate voter records and protect its electoral process from *possible* fraud (emphasis added)." *Marston, supra*, at 680.

In the instant action there was certainly, at a minimum, evidence of possible fraud. The Santa Clara study indicated that a substantial number of aliens who had recently registered were misinformed as to their eligibility to vote. Accordingly, the only question is whether the defendants' approach to this problem was "carefully tailored." For purposes of a qualified immunity analysis, the court finds that defendants have met this burden. The imminence of the upcoming election limited the number of corrective or prophylactic measures the defendants could implement. Moreover, the defendants did not proceed with a whole scale investigation of all foreign-born registrants. Instead, they chose to proceed with a limited study to determine the scope of the problem—if in fact one existed—and to determine what additional steps, if any, should be taken. Only a few hundred individuals had

their names checked by the INS. Even fewer were asked to provide additional information about their citizenship and then only after the government's own check proved inconclusive. If the individual had proof of citizenship, he or she was not asked who registered them to vote. As noted, the United States Attorney indicated that no individual found ineligible to vote would be prosecuted for registering. There is also no indication any of the local defendants intended to prosecute any of these individuals under state law. Finally, there is no evidence that any individual was denied the right to vote or otherwise penalized for merely refusing to cooperate with the survey. The degree of intrusiveness in the instant case contrasts sharply with the burden imposed by a residency requirement.

Accordingly, the court finds that defendants' actions did not violate any clearly established right held by either the individual or group plaintiffs to participate in the electoral process.

Plaintiffs also argue that strict scrutiny should be applied to defendants' conduct since they "admittedly" singled out racial groups as subjects of investigation. The basis for this contention is unclear. Mr. Russoniello did not specifically request a sampling of voter affidavits based on the affiants' racial or ethnic background; the request was limited to recently registered foreign-born individuals who requested bilingual voting information. It is not altogether clear that a language based classification, standing alone, is synon[y]mous with a racial or ethnic group classification. In a number of civil rights cases, a variety of courts have considered and rejected such a conclusion. *Vasquez v. McAllen & Supply Co.*, 660 F.2d 686 (5th Cir. 1981) (employer's English-speaking requirement did not violate Title VII or § 1981 as applied to a monolingual Hispanic employee); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980) (employer's "speak-only-English" rule did not violate Title

VII or § 1981 as applied to Hispanic employee); *See also, Guadalupe Org. Inc. v. Tempe Elementary School Dist. 3,* 587 F.2d 1022, 1026 n. 3 (9th Cir. 1978) (decision to provide or not provide bilingual education to children of Mexican-American and Yanqui Indian origin does not involve a classification based on a suspect class; the Equal Protection Clause neither requires nor prohibits a public school district from providing bilingual-bicultural education to Non-english speaking children).

In *Garcia, supra,* the court made the following observation:

> National origin must not be confused with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage, *Espinoza v. Farah Manufacturing Co.,* 1973, 414 U.S. 86, 94 S.Ct. 334, 38 L.Ed.2d 287 or poverty, *Ybarra v. City of Los Altos,* 9 Cir. 1974, 503 F.2d 250, 253 or with activities not connected with national origin, such as labor agitation, *Balderas v. Las Casitas Farms, Inc.,* 5 Cir. 1974, 500 F.2d 195, 198. *Garcia, supra,* at 269.

In discussing basic concepts of equal protection considerations, the court noted that the highest level of scrutiny has been traditionally reserved for classifications which are based on immutable characteristics, such as sex, race or national origin. The court observed that:

> [t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might be an immutable trait like skin color, sex or place of birth. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice. *Id.* at 270.

In *Vaquez, supra,* the court went even further, finding that an English only rule, by itself, was not illegally discriminatory even when applied to a former employee who could only speak Spanish.

Based on the foregoing, the court concludes that defendants did not violate any clearly established constitutional right merely by limiting their study to individuals who requested bilingual ballots. Even if it is assumed that defendants' study was based, at least in part, on national origin considerations, it is not apparent that a strict scrutiny analysis is required. Both the Supreme Court and the Ninth Circuit have considered the extent to which the government may inquire as to the citizenship of a group of people based wholly or in part on their apparent race or national origin. The issue has arisen in cases involving investigations of the INS and the border patrol aimed at identifying "illegal" aliens which, by their nature, invariably include investigating and questioning legal residents as well as illegal ones. The argument has been made to both courts that these investigations violated the Equal Protection Clause.[2] This argument, however, has been met with silence. Instead, these courts—along with virtually all others that have considered the matter—have limited their inquiry to determining whether the investigation violated the Fourth Amendment's prohibition on unreasonable "search and seizures." In contrast to a strict scrutiny analysis, a Fourth Amendment inquiry greatly reduces the burden placed on the governn ent. Instead of a compelling state interest, the government need only establish "probable cause" and then only if a search or seizure occurred. Accordingly, even though the standards differ drastically, this line of cases is certainly relevant to determining whether defendants violated clearly established constitutional prohibitions.

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[2] See, e.g., Brief for Respondent at 53-54, United States v. Ortiz, 422 U.S. 891 (1975); Brief for Respondent at 46-55, United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Inter'l Ladies Garment Workers v. Sureck, 681 F.2d 624, 628 n. 7 (9th Cir. 1983)

For purposes of an arrest or a full scale custodial interrogation, the Supreme Court has held that an Hispanic appearance does not, by itself, constitute probable cause, regardless of whether the suspect is in or out of the border area. *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973) (roving patrol); *United States v. Ortiz,* 422 U.S. 891 (1975) (fixed checkpoint).

Probable cause, however, is not always required before the government may question an individual as to his citizenship or residency status. Most recently, the Ninth Circuit found that there was no seizure for Fourth Amendment purposes when INS agents approached a Hispanic appearing individual in an open field and proceeded to ask him questions. *Benitez v. I.N.S.,* ____ F.2d ____ (9th Cir. June 10, 1983). *Accord, Zepeda v. INS,* ____ F.2d ____ (9th Cir. June 16, 1983) ("neither questioning in general nor questioning about immigration status requires reasonable suspicion of alienage, for neither involves a seizure in violation of the fourth amendment."); *Cuevas-Ortega v. INS,* 588 F.2d 1274 (9th Cir. 1975) (voluntary questioning of suspected illegal alien in her home); *Cordon de Reano v. INS,* 554 F.2d 944 (9th Cir. 1977) (same). Benitez voluntarily offered to retrieve documents from his car which would show that he was a legal resident. As to the question of voluntariness, the court noted that there was "no evidence of the use of force, a display of a weapon, or the threatening presence of several officers."

In a series of recent cases, the Circuit has considered the constitutionality of the INS's practice of conducting "sweeps" of workplaces, factories, restaurants and other areas to find illegal aliens. Typically, in the case of a factory sweep, the procedure begins with the surveillance of a particular workplace. Once the decision is made to conduct a sweep, a number of INS agents enter the site and effectively "seal" all exits. Most, if not all workers are then

subjected "to at least a visual perusal by investigators, if not actual questioning. . . " *International Ladies Garment Workers' Union v. Sureck,* 681 F.2d 624, 630 (9th Cir. 1983) *cert. granted sub nom.,* ____ U.S. ____ 103 S.Ct. 1872 (1983).

Plaintiffs in *Sureck, supra,* – the ILGW union, two United States citizens and two resident aliens – sought "declaratory and injunctive relief from the INS' pattern and practice of conducting factories and workplaces sweeps for purposes of locating illegal aliens." *Id.,* at 626, The court found that "the execution of the factory surveys, while not rising to the level of an arrest requiring the general rule of probable cause, sufficiently intrudes upon the privacy and security interests of the workers that a seizure of the workforce occurs during the surveys." *Id.,* at 630.

Having determined that a seizure occurs during a factory sweep, the court next determined the appropriate constitutional standard to apply to the INS' conduct. After a thorough review of the applicable case law, the court concluded that:

> INS investigators may not seize or detain workers for citizenship status questioning unless the investigators are able to articulate objective facts providing investigators with a reasonable suspicion that each questioned person, so detained, is an alien illegally in this country. *Id.* at 638.

The court noted that the elements of illegality and specificity contained in the above standard are necessary, at least in part, to protect the Fourth Amendment rights of innocent workers.

Certainly, under this line of cases, defendants' action would be considered constitutional. There is no evidence that any of the individuals surveyed were involuntarily detained or interrogated. Even if a detention occurred, the

defendants had a "reasonable suspicion" that each individual had committed a crime, i.e. registered to vote without being eligible.

Plaintiffs have failed to cite a single case in which an INS citizenship investigation of this nature has been subjected to an equal protection analysis. This court has carefully reviewed the applicable case law and found, as noted *supra,* that while the argument has been made to numerous courts, it has largely been ignored. In fact, the court is aware of only one case in which the issue has been given anything more than a cursory acknowledgement. In *Mendoza v. INS,* 559 F. Supp. 842 (W.D.Tex. 1982) plaintiffs sought to enjoin the INS' practice of conducting "dragnet sweeps" of various bars throughout the Mexican-American section of El Paso, Texas. Plaintiffs were two bar owners and United States citizens who had been interrogated, at least in part, on the basis "of their obvious Mexican descent." *Id.,* at 845. Along with a Fourth Amendment claim, all the plaintiffs alleged that the INS' conduct violated their right to equal protection of the law.

The facts concerning the confrontations between the INS agents and the two individual plaintiffs are as follows:

> Robert Luna, an American citizen, was arrested at El Retiro. He produced valid documents establishing his citizenship, but the interrogating agent discredited their authenticity since Luna spoke no English. Luna was arrested, and detained for four hours.
>
> At Montona Village, Pascual Mendoza, an El Paso fireman and American citizen, was interrogated concerning his citizenship. Mendoza was highly offended by the interrogation and refused to cooperate. INS agents escorted him to the street where two police officers arrested him for drunk and disorderly conduct and drove him to the police station. He was not booked and no criminal proceedings were initiated as a result of the arrest. *Id.,* at 845.

The court held that the INS conduct amounted to a "seizure" of those individuals found in the bars, including the plaintiffs. The court concluded, as did the Ninth Circuit in *Surteck,* that:

> Absent consent, an INS agent may not even detain and interrogate a person believed to be an alien unless the agent has a reasonable suspicion based on articulable facts and rational inferences that the person not only is an alien but is illegally in the country. *Id.* at 847.

Applying this standard, the court granted a preliminary injunction, preventing the INS from conducting similar warrantless dragnet sweeps and "detaining to investigate the alien status of any individual as to whom the agent has not reasonable suspicion that the individual is illegally in the country." *Id.,* at 851.

The court, however, rejected the plaintiffs' equal protection claims. While it was undisputed that the INS' conduct would primarily impact on El Paso's Mexican-American community, the court concluded that "the bar owners were not denied equal protection simply because their bars and their patrons were subjected to scrutiny by the INS agents." *Id.,* at 850. Further, the court found that while "[p]laintiffs Mendoza and Roberto Luna complain that they were interrogated more vigorously than others and arrested solely because of their apparent Mexican descent, . . . their detention and interrogation were based not solely upon their heritage but on additional reasonable circumstances." *Id.* Moreover, the court stated that there was no evidence that even suggested that the INS "formulated their plan for the area control operation for the purpose of denying any Mexican-American equal protection of the law. Discriminatory intent must be shown to recover for denial of equal protection. *See Washington v. Davis,* 426 U.S. 229 (1976)." *Id.*

In the instant action, it is abundantly clear that no individual was forcefully detained or interrogated. Moreover, the questioning that did occur was not based solely upon these individual's ethnic appearance but upon other "reasonable circumstances" including their apparent illegal registration.

Based on the foregoing, the court concludes that plaintiffs' equal protection causes of action against all defendants should be dismissed. For the same reasons, plaintiffs Fifteenth Amendment claims should be dismissed.

IV.

Plaintiffs' Voting Rights Act cause of action must also be dismissed. Plaintiff cites no authority which indicates that the Act has any application to a voting fraud investigation initiated by the federal government. Finally, the court finds that plaintiffs' First Amendment right of association cause of action must be dismissed. The minimal intrusion imposed by defendants' conduct was clearly outweighed by the government's interest in preventing voter fraud. Moreover, to the extent that plaintiffs allege defendants' actions "chilled" their First Amendment rights merely by conducting the investigation, the complaint must be dismissed for failure to state a claim. *Laird v. Tatum,* 408 U.S. 1 (1972).

V.

The court has considered the remainder of plaintiffs claims and arguments and found them unpersuasive. Accordingly, the action shall be dismissed and judgment entered in favor of the defendants.

IT IS SO ORDERED.

Date: SEP 12 1983

/s/ SPENCER WILLIAMS

United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 82 2102 SW

JOSE J. OLAGUES ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

[Filed May 24, 1982]

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT RUSSONIELLO'S MOTION TO DISMISS

Defendant Joseph Russoniello's motion to dismiss came on before the court on May 24, 1982 at 9:30 am. After careful consideration of the arguments of counsel, the court hereby grants in part and denies in part the motion to dismiss.

In so much as plaintiffs' complaint seeks injunctive relief against defendant Russoniello, defendant's motion is granted. The court finds that, as a matter of law, it has no jurisdiction to enjoin or otherwise control a preliminary investigation of the U.S. Attorney's office. *See, Jett v. Castenada,* 578 F.2d 842 (9th Cir. 1978).

In so much as plaintiffs' complaint seeks damages for violations of their constitutional rights, defendant Russoniello's motion to dismiss is denied. The court finds that to the extent defendant Russoniello is engaged in investigative activities, he enjoys only a good-faith qualified immunity from damage awards comparable to that extended to other law enforcement officials. *Robichaud v. Ronan,* 351 F.2d 533 (9th Cir. 1965); *Jacobson v. Rose,*

592 F.2d 515, 524 (9th Cir. 1978). Plaintiffs' complaint alleges that present injury to their constitutional rights have resulted from defendant Russoniello's investigation. This allegation is sufficient to defeat a motion to dismiss.

Since the court has dismissed the injunctive aspects of plaintiffs' complaint, the presently scheduled hearing on plaintiffs' motion for preliminary injunction is hereby vacated.

IT IS SO ORDERED.

Dated: May 24, 1982

/s/ SPENCER WILLIAMS

United States District Judge

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Supreme Court, U.S.
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No. 86-1217

In The

Supreme Court of the United States

October Term, 1986

JOSEPH P. RUSSONIELLO, *et al.*,

Petitioners,

v.

JOSE J. OLAGUES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The respondents, an American citizen of Hispanic descent and three organizations involved in voter registration of Hispanic and Chinese-American citizens, were the subjects of a criminal investigation which explicitly and intentionally targeted Spanish-speaking and Chinese-speaking voters and selected individuals within these groups based solely on the exercise of their protected right to request bilingual voting materials. The questions sought to be presented are:

1. Whether Article III of the Constitution is an absolute barrier to judicial consideration of equitable or monetary claims arising from law enforcement investigative activities pursuant to an investigation that explicitly targeted Hispanic and Chinese-American individuals and groups based on the exercise of protected voting rights, and imposed special citizenship verification procedures on this racially-defined segment of the electorate.

2. Whether principles of equity bar a federal court from granting equitable relief against such a facially discriminatory criminal investigation which targets individuals based on their exercise of fundamental voting rights, when there is no criminal prosecution pending or imminent.

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No. 86-1217

In The

Supreme Court of the United States

October Term, 1986

JOSEPH P. RUSSONIELLO, *et al.*,

Petitioners,

v.

JOSE J. OLAGUES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

California Government Code, 6253.6 provides:

(a) Notwithstanding the provisions of Sections 6252 and 6253, information compiled by public officials or public employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets, made in accordance with any federal or state law, or other data that would reveal the identity of the requester, shall not be deemed to be public records and shall not be provided to any person other than public officers or public employees who are responsible for receiving those requests and processing the same.

(b) Nothing contained in subdivision (a) shall be construed as prohibiting any person who is other-

wise authorized by law from examining election materials, including, but not limited to, affidavits of registration, provided that requests for bilingual ballots or ballot pamphlets shall be subject to the restrictions contained in subdivision (a).

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STATEMENT OF THE CASE

On April 19, 1982, three weeks before the close of voter registration for the 1982 California primary election, a criminal investigation of Chinese-speaking and Spanish-speaking voters, as well as individuals and organizations who were assisting and encouraging voter registration in the Chinese and Hispanic communities, began. The investigation, which was launched by petitioner Russoniello, the United States Attorney of the Northern District of California, was a cooperative law enforcement effort of the Immigration and Naturalization Service ("INS"), the Federal Bureau of Investigation ("FBI") and the district attorneys and voting registrars of nine Bay Area counties.[1]

The initial subjects of the investigation were defined by three criteria: they were (1) recently registered, (2) foreign born, and (3) had requested voting materials in Spanish or Chinese that were available pursuant to the federal Voting Rights Act. The U.S. Attorney requested

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[1]The district attorneys and voting registrars of each of the nine counties were defendants and appellees in the action below, together with the United States Attorney and the District Director of INS (the petitioners in this Court). None of these local officials is seeking review in this Court of the decision below.

that the district attorneys of each county randomly select twenty-five persons meeting these criteria, and these persons then had their citizenship status investigated by the INS and the FBI through the use of fingerprint indices and immigration records. Unless this record check produced positive confirmation of citizenship, such individuals were subjected to further investigation by local law enforcement officials or the FBI. (Pet. App. at 21a). The individuals under investigation were required to establish their citizenship, and, if unable to do so, they were questioned concerning the identity of the individual or organization who had assisted them in the registration process. (Pet. App. at 4a, n.3, 5a).

Russoniello stated that he was not interested in prosecuting ineligible registered voters, but that county officials could prosecute them under state law. The focus of the U.S. Attorney's concern was to prosecute groups or individuals who had fraudulently registered bilingual voters. (Pet. App. at 3a, 14a).

To the extent developed in the facts in the record below, the impetus for commencing an investigation which targeted only persons requesting Spanish or Chinese bilingual ballots was an earlier investigation by the Santa Clara District Attorney that had uncovered instances where non-citizens had been registered to vote. (Pet. App. at 3a). That investigation, however, had not been of persons requesting bilingual ballots, and revealed no problem concerning registration by bilingual ballot users. Rather, the Santa Clara study was an investigation of all foreign-born voters in one election district in the City of San Jose. (*Id.*)

Russoniello justified focusing on only Chinese-speaking and Spanish-speaking voters by referring to "voter

registration drives recently undertaken to register those voters and the fact that the Spanish language voter registration materials did not accurately translate the requirement that a voter must be a citizen." (Pet. App. at 4a).

A number of individuals and public officials "expressed concern that the timing of the investigation and its focus on particular racial groups would have an intimidating effect on their right to vote." (Pet. App. at 4a).[2] To the extent developed in the limited proceedings below, the "record provides support" (Pet. App. at 22a) for respondents' claims that these law enforcement actions against Chinese-speaking and Spanish-speaking individuals and groups intimidated and discouraged persons from participating in the voter registration drives of respondent organizations and from registering to vote and requesting bilingual ballots. The record also demonstrated a decline in new registration in the first weeks of the election campaign. (Pet. App. at 5a, 7a. 13a-14a, 20a, 22a-23a).

Based on the results of the INS record checks,[3] petitioner Russoniello sought to have 113 persons subjected to further investigation and citizenship verification by either

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[2]For example, March Fong Eu, Secretary of State of California, wrote to Russoniello on May 4, 1982 and expressed concern that this discriminatory investigation raised serious questions of law and policy, and would result in discouraging persons of "Hispanic and Chinese heritage" from registering. (Pet. App. at 4a, n.4).

[3]This procedure was followed in spite of the fact that the earlier Santa Clara study relied on by Russoniello noted that 29 out of 30 persons reported as aliens as a result of INS record checks were in fact citizens, and concluded that INS records were "out of date, incomplete and inadequate." (Clerk's Record on Appeal 106, Exhibit E).

local officials or the FBI. This investigation did not produce evidence of criminal conduct by any individual or group, and it was terminated.

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REASONS WHY THE WRIT SHOULD BE DENIED

Succinctly stated, respondents in this case were subjected to a criminal investigation which explicitly and intentionally targeted two national origin groups, and which focused and imposed burdens upon individuals within these groups based solely on their exercise of voting rights provided for by Congress to remedy "pervasive" discrimination against these groups.[4]

Notwithstanding petitioners' broad arguments presented here (but not below), neither Article III nor equity principles bar adjudication of this challenge to a "form of

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[4] "The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices."

42 U.S.C. § 1973b(f)(1); *see also* 42 U.S.C. § 1973aa-1a.

criminal investigation directed against [a] plaintiff because of his race." *Hall v. Pennsylvania State Police*, 570 F.2d 86, 91 (3rd Cir. 1978). Apart from the inapplicability of petitioners' arguments to this case, the posture of this case primarily makes it inappropriate for review by this Court.

I. THE POSTURE OF THIS CASE MAKES IT PREMATURE AND INAPPROPRIATE FOR PLENARY REVIEW.

Petitioners seek to have this Court grant plenary review of the Court of Appeals' interlocutory order remanding this case to the District Court. This Court's practice, however, is not to review cases prior to a final decree, "except in extraordinary cases." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The posture of this case vividly demonstrates the wisdom of avoiding plenary review prior to the development of a full factual record, and consideration of the legal arguments and of intervening developments by the courts below in the first instance.

A. The Absence of a Factual Record, Particularly in View of Petitioners' Assertion of New Arguments Never Raised Before or Addressed by the Courts Below, Makes the Interlocutory Decision Presented for Review Wholly Inappropriate for this Court's Consideration.

On May 24, 1982, less than three weeks after the complaint in the instant action was filed, the District Court accepted petitioners' argument that a federal court has no subject matter jurisdiction to enjoin a prosecutorial investigation, and dismissed respondents' claim for injunctive relief. (Pet. App. at 96a-97a). The Court of Appeals

reversed this dismissal, ruling only that there was subject matter jurisdiction, and then properly remanded "this issue to the district court to determine whether an injunction should issue." (Pet. App. at 15a). There was no factual record on the issue of injunctive relief, nor is there yet such a factual record.

The Court of Appeals also did not reach the merits of the substantive claims. The Court remanded respondents' claim of denial of the fundamental right to vote, finding that respondents had raised a "material issue of fact" as to whether the investigation intimidated registration and requests for bilingual voting materials by Chinese-speaking and Spanish-speaking persons. (Pet. App. at 20a). The court also found that the "record provides support" for respondents' First Amendment claim that the investigation directly interfered with associational activities and that respondents had raised "a material issue of fact as to the extent of the burden on the [respondents'] First Amendment interests." (Pet. App. at 22a-23a). The court also remanded the equal protection claim for findings as to whether petitioners' targeted investigation of two national origin groups met constitutional standards. (Pet. App. at 19a).

Thus, this case is now before this Court without the benefit of findings of fact, and the issues raised by petitioners are not presented with the "clarity, precision and certainty" that would be provided by a fuller record. *Rescue Army v. Municipal Court*, 331 U.S. 549, 576 (1947); *see also, e.g., Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588, n.2 (1972) ("When the issues are not presented with the clarity needed for effective adjudication, appel-

late review of a federal court judgment is every bit as inappropriate as was review of a state court judgment in *Rescue Army.*"); *Minnick v. California Dept. of Corrections,* 452 U.S. 105, 123 (1981); *Cowgill v. California,* 396 U.S. 371 (1970) (Harlan, J., conc. op.).

Petitioners do not argue (as they did below) that federal courts lack jurisdiction to enjoin a pre-indictment investigation by a prosecutor. Rather, they now argue *for the first time* that Article III deprives a federal court of the power to adjudicate damages as well as equitable claims arising from law enforcement investigations. (Pet. at 12). Furthermore, the determinative criterion for petitioners' expansive assertion of absolute nonjusticiability is no longer whether the investigation is in the pre-indictment stage, but whether it is "mature, coercive governmental action." (Pet. at 17). Thus, petitioners now ask for the first time in this case that a judicial bright line be drawn through a spectrum of pre-indictment investigatory activities to determine when such activities have become sufficiently "mature" and "coercive" to warrant judicial review. But the drawing of any lines is difficult at best without a factual record in which to apply petitioners' newly articulated test, and should not be considered in the first instance by this Court. *See Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 147, n.2 (1970).

Similarly, the lower courts never ruled on the propriety of injunctive relief, and petitioners' argument with respect to the propriety of injunctive relief is integrally

entwined with the facts of this case.[5] Petitioners now enunciate a standard that must be met for the issuance of equitable relief—the requirement of "extraordinary circumstances"—and they argue that "no such extraordinary circumstances exist here." (Pet. at 24). Petitioners in effect ask this Court for an advisory opinion to determine the standard for enjoining a racially-explicit law enforcement investigation impacting on fundamental rights, without the benefit of a developed factual record, and without a determination by the lower courts of this issue.

Furthermore, the Court should not determine whether the circumstances in this case were "extraordinary" enough to merit injunctive relief (even assuming that that standard is correct) without the "clarity, precision and certainty" provided by factual findings from a fully developed record. Petitioners argue that the "chilling effects" suffered by respondents did not constitute sufficient

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[5]This Court's determination of similar issues of justiciability and injunctive relief in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), was made on the basis of a factual record. The district court in *Lyons* initially granted defendants' motion for partial summary judgment, dismissing plaintiffs' claims for equitable relief based on the absence of a true case or controversy. This decision was reversed by the Ninth Circuit, which held that there was a controversy within the meaning of Article III, and remanded the case for further proceedings. 615 F.2d 1243 (9th Cir. 1980). At this juncture, *Lyons* was in the identical posture as the instant case. This Court then denied the City's petition for certiorari. 449 U.S. 934 (1980). The case then proceeded to hearing below on the issue of injunctive relief. The district court issued findings of fact and a preliminary injunction, and the Ninth Circuit affirmed. 656 F.2d 417 (9th Cir. 1981). This Court then granted certiorari and reversed. 461 U.S. 95 (1983). In ruling that plaintiffs were not entitled to injunctive relief, the Court considered and relied on the "record and findings made on remand." 461 U.S. at 110.

injury to constitute "extraordinary circumstances." (Pet. at 24-25). The claims of respondents, however, far exceed subjective "chilling effects"; the organizational respondents alleged that the investigations targeted against them resulted in intimidation and a consequent loss of membership participation in their critical voter registration drive in the midst of an election campaign and a refusal of Hispanic and Chinese-American citizens to register and request bilingual ballots. (Pet. App. at 5a, 7a, 13a-14a, 20a, 23a). The actual extent of the injuries caused by petitioners' interference with the exercise of fundamental rights, and whether these injuries were "reparable by the termination of the investigation" (Pet. at 25), is not yet a matter of record, which correctly led the Court of Appeals to recognize that this was a "material issue of fact" to be resolved by the District Court. (Pet. App. at 20a, 23a).[6]

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[6]The full extent and impact of petitioners' racially targeted investigation also may not be revealed until resolution of respondents' request for class certification. This suit is a class action seeking equitable relief for a class of Hispanics and Chinese-Americans who have been or will be subjected to criminal investigation solely because they requested bilingual election materials, and a class of persons and organizations involved in voter education projects with Americans of Hispanic and Chinese descent. (First Amended Complaint, ¶ 11). The dismissal by the District Court of the injunctive claims less than three weeks after the complaint was filed removed the focus of the class action aspects of the case at the outset, and no motion for class certification was filed. On remand, respondents will have the opportunity to seek class certification on the injunctive claims, and thus the District Court may have before it a fuller factual record to determine the impact of the investigation. Thus, in *Minnick v. California Department of Corrections*, 452 U.S. at 126, the possibility of a motion for class certification on remand provided grounds for dismissing a writ of certiorari:

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B. The Effect on This Lawsuit of Intervening California Laws Should be Considered for the First Time, If at All, by the Courts Below.

The District Court may also have to address intervening legal developments for the first time in this case. Section 6253.6 of the California Government Code, adopted subsequent to the initiation of petitioners' racially targeted investigation, exempts information concerning voter requests for bilingual ballots from the disclosure provisions of the State Public Records Act and makes it explicit that such information "shall not be deemed to be public records." Because the statute only permits access to these non-public records to public officials "who are responsible for receiving those requests and processing the same," such information will no longer be available to law enforcement officials pursuing a criminal investigation absent a subpoena or court order.

As petitioners conceded in the Court of Appeals,[7] this statute could have an impact on the nature and extent of any further investigation of bilingual ballot requesters, and on its likelihood of recurrence. Petitioners

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> "[I]t is at least possible that claims on behalf of additional employees or job applicants may be asserted on remand. They, as well as the present petitioners, will have the right —even though petitioners' counsel have no such present intent—to adduce additional evidence in support of the complaint . . . ."

[7]In their Suggestion for Full En Banc Rehearing filed in the Court of Appeals on October 8, 1986, petitioners addressed for the first time in this case the significance of this change in California law concerning bilingual ballot requests: "Since that information is no longer public, it would be impossible for the U.S. Attorney again to conduct a similar investigation without court approval." (p. 7).

have argued, and continue to argue, that the investigation was minimally intrusive because it involved only a review of "public records" (Pet. at 19), a characterization which is no longer valid. Furthermore, the fact that further investigations of bilingual ballot requesters would necessitate the use of subpoenas or other lawful process would, even under petitioners' argument, involve "governmental action that is 'regulatory, proscriptive or compulsory in nature.' " (Pet. at 15, 19).

This statute has not been judicially interpreted, and it is not clear what procedures and standards would be necessary to enable prosecutors to use bilingual ballot requests to trigger an investigation, and whether prosecutors would be free to obtain such records for FBI and INS checks as part of a random sample. However, the presence of this statute certainly is a factor which should be addressed for the first time by the District Court on the remand proceedings. *See Rice v. Sioux City Mem. Park Cemetery, Inc.*, 349 U.S. 70, 76-77 (1955); *see also Minnick*, 452 U.S. at 127 ("the trial judge is unquestionably free to recast his findings in response to those legal developments").[8]

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[8]Another subsequent development may also impact on this case. On November 7, 1986, California voters adopted Proposition 63, an initiative now incorporated as Section 6 to Article III of the California Constitution. Known as the "English Only" initiative, Proposition 63 explicitly provides that English is the "official language of California," and that public officials "shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced." (Cal. Const., Art. III, § 6). Beyond that, there is wide disagreement as to the meaning and effect of this constitutional amendment. However, proponents of

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II. PETITIONERS' NEWLY MINTED ARTICLE III ARGUMENT, WHICH WAS NEVER PRESENTED TO THE COURTS BELOW, IS OVERLY BROAD AND INAPPLICABLE TO THIS CASE.

Painting with the broadest possible brush, petitioners now argue for the first time that federal courts have no power to adjudicate any claims arising from law enforcement investigatory activities that have not reached the stage of "mature, coercive governmental action." (Pet. at 17). Petitioners' newly minted Article III argument would apply regardless of whether the claims were equitable or monetary, and regardless of whether a prosecutor was involved in the investigation. (Pet. 17-20). If accepted, law enforcement officials could choose to pursue racially targeted investigations and could use the request for a bilingual ballot as the trigger for such an investigation, and the targets of these actions could never challenge them in a federal court. This far-reaching claim has never been considered by the courts below, the argument itself demonstrates the need for a factual record, and the authorities on which petitioners rely are inapposite.

Although petitioners present an expansive description of the limitations that Article III and separation of

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Proposition 63 have taken the position that it would bar counties who are not mandated by federal law to provide bilingual voting materials from continuing to do so; this would include all the counties affected in the instant case. (Pet. App. at 9a, n.5). This new development may also have to be addressed by the District Court in considering the propriety of equitable relief and the likelihood of a recurrence of the bilingual voter investigation.

power principles place on federal courts in general, and on judicial review of the decisions and actions of prosecutors in particular (Pet. at 12-18), the cases relied on by petitioners have little applicability to the facts of this case. As the petition itself makes clear, the cases cited therein establish the unremarkable principle that courts generally do not review the decision of a prosecutor to prosecute (or not to prosecute), or the decision of what charges a prosecutor should file. Yet this case does not ask a court to assume these prosecutorial functions, nor do respondents seek to enjoin a criminal prosecution. Rather, respondents seek a traditional judicial determination that certain actions of law enforcement officials—targeting a racially-defined segment of the electorate for a criminal investigation and special citizenship verification procedures based on the request for a bilingual ballot—transgress constitutional limits. *Cf. Hall v. Pennsylvania State Police*, 570 F.2d at 89 (police directive to banks to photograph suspicious-looking blacks "facially involve[s] federally protected rights").[9]

Because this case involved a preliminary investigation, and because the actions were taken against randomly se-

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[9]This is not a case in which respondents are asking the court to act "as virtually continuing monitors of the wisdom and soundness of Executive action" (*Laird v. Tatum*, 408 U.S. 1, 15 (1972)), nor seeking "a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties" (*Allen v. Wright*, 468 U.S. 737, 761 (1984)). Rather, the respondents in the instant case are seeking relief in the form of a declaratory judgment and a narrow prohibitory injunction against the use of a facially discriminatory means of criminal investigation and voter citizenship verification. Clearly, this is an area falling well within the "traditional role" of the courts to interpret the Constitution, *Powell v. McCormack*, 395 U.S. 486, 548 (1969), and the courts are familiar with the standards required for decision and competent to fashion a remedy.

lected individuals who were neither criminal suspects nor likely to be charged with any crime, respondents' challenge is far removed from a challenge to a prosecutorial decision of whether to prosecute or how to manage a specific case. The underlying premise of the cases barring review of prosecutorial discretion is that constitutional transgressions can be challenged after indictment in the "ensuing criminal proceeding" (Pet. at 15), thereby guaranteeing that "safeguards built into the judicial process" will serve as "sufficient checks on agency zeal." *Butz v. Economu,* 438 U.S. 478, 512, 516 (1978). Yet by imposing this investigation on a randomly selected group of individuals, petitioners insured that many (or, as it in fact turned out, *all*) of the persons and organizations who were subjected to this special and discriminatory treatment would never be subjected to any criminal proceeding. Thus, petitioners' assertion that Article III stands as an absolute barrier to judicial review of these governmental actions would, if accepted, deprive respondents of the only forum where they can ever seek adjudication of these claims of present and irreparable injuries to fundamental constitutional rights.[10]

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[10]Because of the clear constitutional command against actions by the government premised on the race or national origin of individuals or groups, cases involving facially discriminatory investigations are rare indeed. But when a court is faced with "a governmental directive which calls for a specified activity directed against a group of citizens identified on the basis of race," *Hall v. Pennsylvania State Police,* 570 F.2d at 89, there is no Article III barrier to adjudicating such a claim. Rather, "a criminal investigation directed against the plaintiff because of his race" (*id.* at 91) "facially involve[s] federally protected rights" (*id.* at 89) that lie at the heart of the concerns of the federal judiciary.

Petitioners argue that "anticipatory judicial intervention into the investigative process" will prove unduly disruptive to law enforcement interests. (Pet. at 21). The argument that persons whose fundamental constitutional rights are being abridged by the actions of law enforcement investigators must wait until after indictment to seek a judicial remedy leaves out part of the essential equation that this Court has used in determining whether executive action is ripe for judicial review. This Court has consistently noted that the interest in postponing review until the question arises in some more concrete and final form must be balanced against the "hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). In the instant case, the balance weighs heavily in favor of judicial review. Fundamental constitutional rights are at issue, and there is no doubt that the "effects" of the investigation have been "felt in a concrete way" by respondents. *Id.* at 148-49. Thus, there is nothing premature about respondents' challenge to the injuries that they have suffered and continue to suffer as a result of petitioners' actions. Furthermore, for these respondents there will be no subsequent opportunity or forum to have these claims adjudicated.

Under petitioners' new Article III argument, the nonjusticiability of respondents' claims is premised on the characterization of the investigation as "noncoercive" and as imposing on respondents merely the "expense and an-

noyance of being identified as a witness or suspect in connection with possible criminal activity." (Pet. at 20). This attempt to pigeonhole the investigation as simply "information-gathering and deliberative" (Pet. at 15) flies in the face of the unrebutted factual allegations in the record.

Respondents were singled out solely on the basis of national origin characteristics and their exercise of a statutory right that was expressly enacted for their protection. With no grounds to suspect any individual of any unlawful conduct, law enforcement officials randomly selected individuals of the racially targeted groups and subjected them to record checks by the INS and the FBI to determine their citizenship, and then to questioning by local law enforcement and FBI agents concerning not just their citizenship but also their associational activities. (Pet. App. at 5a). Thus, these procedures not only constituted an investigation targeting national origin groups, but they imposed on respondents procedures and an "affirmative obligation" that no other group of voters had to face. (Pet. App. at 12a, 74a). *See Laird v. Tatum,* 408 U.S. 1, 12 (1972).

Petitioners' racially targeted investigation discouraged members of the organizational respondents from participating in the voter registration drive for fear of being swept up in this criminal investigation. Additionally, citizens in the targeted national origin groups were discouraged from registering to vote, as the very tool created by Congress to facilitate voting became transformed into a

license to institute a criminal investigation. (Pet. App. at 13a, 14a). These injuries,[11] and the actual impact of petitioners' acts, belie petitioners' benign depiction of this investigation, and are among the issues of fact remanded to the District Court. These factual issues should be resolved before this Court considers petitioners' sweeping Article III claim.

III. PETITIONERS' EQUITY ARGUMENTS ARE INAPPLICABLE TO THE INSTANT CASE AND DO NOT PRECLUDE THE DISTRICT COURT FROM CONSIDERING FOR THE FIRST TIME THE PROPRIETY OF EQUITABLE RELIEF.

Again advancing an argument not directly addressed by the courts below, petitioners now assert that equitable

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[11]Petitioners ignore these injuries when they assert that "allegations of 'chill' and 'stigma' are simply inadequate to make governmental action judicially reviewable." (Pet. at 20). In relying on *Laird v. Tatum,* 408 U.S. 1, petitioners ignore the Supreme Court's emphasis on the very limited nature of the claim in *Laird,* in that plaintiffs in *Laird* were basing their First Amendment challenge on "the mere existence, *without more,* of a governmental investigative and data-gathering activity," *id.* at 10-11 (emphasis added), and asserting an injury to their First Amendment rights "caused, not by any 'specific action of the Army against them, [but] only [by] the existence and operation of the intelligence gathering and distributing system.'" *Id.* at 3. Respondents, on the other hand, were the focused targets of the bilingual ballot investigation, and they claim "specific present objective harm [and] a threat of specific future harm." *Id.* at 14.

Also, the investigation in the instant case intentionally and explicitly focused on individuals within two national origin groups. This Court has consistently recognized that stigmatizing members of disfavored groups "as less worthy participants in the political community," *Heckler v. Matthews,* 465 U.S. 728, 739-40 (1984), is "judicially cognizable to the extent that respondents are personally subject to discriminatory treatment." *Allen v. Wright,* 468 U.S. at 757, n.22.

relief can issue only under "extraordinary circumstances" and that "no such extraordinary circumstances exist here." (Pet. at 24). Not only is the legal premise of petitioners' argument flawed, but petitioners' facially discriminatory investigation triggered by the exercise of fundamental rights constitutes sufficient "extraordinary circumstances" to warrant equitable relief.

Petitioners argue that "settled principles of equity jurisprudence" absolutely bar equitable relief as a matter of law (Pet. at 22), and they ground their argument in *Younger v. Harris,* 401 U.S. 37 (1971), and the "*Younger* line of cases" (Pet. at 24). Neither *Younger* nor its "line of cases" has any applicability here.

The primary principle, or "more vital consideration," 401 U.S. at 44, operative in *Younger* was "Our Federalism," or "a proper respect for state functions." *Id.* This principle cannot be relied on by these federal petitioners to insulate themselves from judicial scrutiny.

Petitioners also rely on the other "underlying" principle in *Younger,* namely the restraint against "courts of equity from interfering with criminal prosecutions." *Id.* at 44. Because the rationale for the *Younger* restrictions on equitable relief is "to prevent erosion of the role of the jury and avoid a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted," *id.,* the "*Younger* line of cases" applies when there is a pending prosecution or proceeding. *Steffel v. Thompson,* 415 U.S. 452 (1974) (threat of state prosecution insufficient to invoke *Younger* restrictions). As summarized in *Doran v. Salem Inn,* 422 U.S. 922, 930-31 (1975): "In the absence of [an ongoing state criminal

proceeding], [plaintiffs] . . . were entitled to have their claims for preliminary injunctive relief considered without regard to Younger's restrictions."

The absence of any pending, imminent or threatened prosecution in the instant case means not only that this federal action was not interfering with another proceeding, but also that, from the respondents' vantage point, there was no alternative forum where they could adjudicate their constitutional rights.[12] It is the essence of *Younger* that the injuries are not " 'irreparable' in the special legal sense of that term," 401 U.S. at 46, when a plaintiff can raise the same claims in a pending proceeding (generally the state criminal prosecution). But respondents here are not, and will not be, facing any criminal prosecution, and thus have no forum outside of the federal court to redress the injuries that they suffered and continue to suffer.

Leaping from "a line of cases" concerning the availability of equitable relief in federal court from *pending state prosecutions* to the issue of the availability of equitable relief from *federal criminal investigative activities,* petitioners baldly state that "no lesser restriction on judicial power can apply where noncoercive federal criminal investigative activities are concerned." (Pet. at 23). Thus, as with its prior argument, petitioners are attempting a radical extension of existing law by ripping the *Younger* restrictions from their moorings and underlying rationale and applying them in a completely different context, where

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[12]In fact, Russoniello stated at the outset of the investigation that he had no intention of prosecuting registrants who were illegally registered. (Pet. at 4).

none of the concerns the Court expressed in *Younger* apply.[13]

Even under petitioners' test, it is clear that respondents have alleged facts that are more than sufficient to justify equitable relief from a federal court, and that there is no compelling need for this Court to review this matter prior to the remand proceeding where respondents will have a chance for the first time to develop the factual record with respect to the injunctive claims in this case.

Notwithstanding petitioners' assertion to the contrary, respondents have suffered " 'great and immediate' [injuries] within the meaning of the *Younger* line of cases." (Pet. at 24). In the instant case, a racially targeted segment of the electorate was singled out for a criminal investigation and special citizenship verification procedures, and individuals were randomly targeted based solely on the exercise of their right to request bilingual voting materials. The organizational respondents can demonstrate

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[13]The cases cited by petitioners dealing with federal criminal investigations (Pet. at 24) do not support petitioners' attempt to engraft the *Younger* bar to equitable relief from a federal court onto the facts of this case. In fact, in *Pollard v. Roberts*, 285 F.Supp. 248 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968), the court issued an injunction against a preliminary investigation by a local district attorney, holding that prosecutorial discretion "does not extend so far as to permit impingement on the associational rights of people on the mere suspicion that the information sought may constitute or lead to evidence that some of the people concerned, or others have violated State election laws." *Id.* at 257-58. Similarly, in *Jones v. Unknown Agents of the Federal Election Commission*, 613 F.2d 864 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), the court noted that injunctive relief was the "appropriate remedy" against that part of a law enforcement investigation of election fraud that included questions delving into the "political beliefs of the individual appellants." *Id.* at 873, n.20.

direct injury to associational interests, including intimidation of members and a decline in participation in voter registration efforts and a decline in registration itself. (Pet. App. at 7a, 13a-14a).

Petitioners try to dismiss these injuries as "reparable" by pointing out the fact that the investigation has terminated. (Pet. at 25). However, the termination of this investigation does not alter the fact that petitioners' investigation has converted a request for a bilingual ballot into a license to commence a criminal investigation, with the resultant and obvious burdens that this has placed on Hispanic and Chinese-American citizens and their organizations with respect to requesting bilingual ballots and participating in the political process. Such facially discriminatory action against persons and groups exercising fundamental voting rights constitutes sufficient "extraordinary circumstances" to warrant equitable intervention by a federal court.

CONCLUSION

For the foregoing reasons, the writ of *certiorari* should be denied.

Respectfully submitted,

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(3)

No. 86-1217

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH P. RUSSONIELLO, ET AL., PETITIONERS

v.

JOSE J. OLAGUES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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In our petition, we asked the Court to decide: (1) whether, in general, a federal district court has the authority to entertain a pre-indictment challenge to the manner and scope of a criminal investigation by the Executive Branch, apart from any subpoenas, searches, seizures, or other coercive acts that are issued or undertaken during the investigation; and, (2) assuming a federal court has such authority, whether it is nonetheless barred from enjoining or declaring an investigation unconstitutional where it

is undisputed that government officials have a legitimate investigative purpose and have not violated any clearly established constitutional rights. Respondents' arguments in opposition to certiorari review of these questions are unfounded.

1. Respondents first contend (Br. in Opp. 6-12) that the government's petition is "premature" and "inappropriate for plenary review." Such an assertion is ironic in the context of this case, given our contention that the lawsuit itself is premature and therefore nonjusticiable.

There is, of course, no question that the Court has jurisdiction to entertain this petition. See 28 U.S.C. 1254(1). And where the very pursuit of the litigation is the wrong to which the government is objecting, it is wholly appropriate for the Court to grant the petition. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737 (1984). The Court has so indicated in cases where it has found that a substantial question exists concerning the propriety of allowing litigation to continue against the United States or its agents. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947).

Here, the government submits that it is inappropriate, and highly disruptive, to allow respondents to seek judicial supervision of criminal investigations by the Executive Branch.[1] We do not dispute that

[1] Respondents imply (Br. in Opp. 5-6, 8, 13) that the petition improperly raises a new argument concerning the district court's jurisdiction to adjudicate their claims. As respondents elsewhere concede (Br. in Opp. 6), however, petitioners argued in both courts below that "a federal court has no subject matter jurisdiction to enjoin a prosecutorial inves-

prosecutors or law enforcement officers, like any other officers of government, may be challenged in court when they take actions having a direct and coercive impact on an individual or group of individuals—as, for example, when they issue a subpoena for testimony or records, or when they execute a search warrant. But when the Executive Branch "does not exercise its *coercive* power over an individual's liberty or property rights," it "does not infringe upon areas that courts often are called upon to protect." *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985) (emphasis in original). Respondents in this case object not to any such coercive requirement or limitation on their actions, but simply to the idea that the government's investigative machinery has focused on activities in which they may be involved. For the courts to entertain such complaints would not only fly in the face of precedent, but would create a major new avenue for harassing litigation and the diversion of prosecutorial efforts.

Respondents cannot properly justify this unwarranted interference with the noncoercive actions of the Executive Branch merely by claiming (Br. in Opp. 10, 13-18) that these investigative activities have chilled the exercise of their constitutional and statutory rights. Even assuming arguendo that respondents feel "intimidat[ed]" by these investigative activities, that members of the organizational re-

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tigation * * *." The articulation and elaboration of that argument in the petition is well within the limits of propriety. Under the rules of this Court, parties "are not confined * * * to the same arguments which were advanced in the courts below upon a Federal question there discussed" (*Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899)). See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 164-165 (6th ed. 1986).

spondents have been "discouraged" from "participating in the voter registration drive for fear of being swept up in this criminal investigation," and that Hispanic and Chinese-American citizens have been "discouraged" from registering to vote, it nevertheless remains true that such investigative activities are nonjusticiable. The price of providing an individual with a judicial forum to remedy the burdens that result from the mere focusing of investigative attention, according to this Court, is too high to pay. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980); *Laird* v. *Tatum*, 408 U.S. 1, 10-15 (1972).

Nor can such premature judicial intervention be justified by the allegation that the investigation has focused, among other things, on the national origin of voter registrants. This Court has long recognized that law enforcement officials may and, indeed, often must consider the national origin or race of suspects and witnesses in conducting criminal investigations. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975); *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986) (Stevens, J., dissenting). Thus, just as it has held that Article III requires First Amendment claimants to allege that the government has exercised its *coercive* powers in a manner that adversely affects their free speech or association rights (see *Laird* v. *Tatum*, 408 U.S. at 10-15), so has the Court held that equal protection claimants must allege that government has exercised its *coercive* powers in a discriminatory manner before the jurisdiction of a federal court may be invoked. See *Allen* v. *Wright*, 468 U.S. 737, 753-756 (1984); cf. *Wayte* v. *United States*, 470 U.S. 598, 607-608 (1985) (selective prosecution claim may be raised after indictment has been filed). Respondents have made no such allegations here.

Respondents' claim that the petition is premature is not strengthened by their argument that intervening state law developments arguably may have changed the information concerning voter registrants available to law enforcement officials.[2] Such changes in state law cannot alter the nonjusticiability of the underlying controversy nor, assuming that jurisdiction exists, can they alter the government's entitlement to summary judgment (as granted by the district court), where the undisputed evidence shows that petitioners' investigation had a legitimate purpose and did not violate any clearly established rights.

2. Respondents also err (Br. in Opp. 18-22) in answering our second point—that, even if a challenge to non-coercive investigative actions is justiciable, equitable principles bar the granting of injunctive or declaratory relief against the government,[3] except in extraordinary circumstances not present here. See *Younger* v. *Harris*, 401 U.S. 37, 43-44 (1971); *Kugler* v. *Helfant*, 421 U.S. 117, 123 (1975). While that principle has been most frequently articu-

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[2] The citation to these intervening legal developments could be relevant only to a claim that respondents' prayers for equitable relief are moot. Respondents, however, noticeably have stopped short of suggesting that their prayers are moot, realizing that in such circumstances this Court would have to vacate the judgment of the court below and remand with instructions to dismiss. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

[3] Respondents likewise err in suggesting (Br. in Opp. 18) that the question whether basic principles of equity jurisprudence bar the issuance of injunctive or declaratory relief in the circumstances of this case was not raised in the court below. That question was the principal focus of Judge Wallace's dissent. See Pet. App. 29a-31a; see also *id.* at 54a-58a, 62a-64a.

lated in cases dealing with the authority of federal courts to intervene in pending state criminal cases,[4] it has also been applied to cases dealing with the authority of the federal courts to enjoin or declare unconstitutional state law enforcement practices (where no proceedings are pending). See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 112 (1983); *Rizzo* v. *Goode*, 423 U.S. 362, 379 (1976).[5] As the holdings

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[4] We note that in *Deakins* v. *Monoghan*, cert. granted, No. 86-890 (Jan. 27, 1987), the Court will decide whether a federal court must abstain from addressing federal constitutional claims where a state grand jury investigation is pending. This petition need not be held pending the Court's resolution of *Deakins*. This case does not involve abstention principles or state grand jury proceedings. Rather, it concerns whether a federal court may enjoin or declare unconstitutional a federal prosecutor's criminal investigation in the absence of extraordinary circumstances. Thus, while somewhat analogous law enforcement concerns are at stake in the two cases, the Court's decision in *Deakins* will not affect the resolution of the questions raised here.

[5] In suggesting (Br. in Opp. 19-21) that the basic equity principles underlying this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971), do not apply where a state criminal proceeding is not pending, respondents confuse the circumstances in which federal courts must "abstain" from deciding federal questions with the circumstances in which equity principles bar federal courts from issuing equitable relief. Absent "extraordinary circumstances," a federal court must "abstain" from adjudicating *any* federal question where state proceedings that will culminate in judicial review of those claims are pending. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, No. 85-488 (June 27, 1986). In the absence of such pending proceedings, the federal court may adjudicate claims for monetary relief regardless of the circumstances (unless an immunity exists). Even where no state proceedings are pending, however, the federal court may not issue injunctive or declaratory relief in the absence of

of the lower federal courts illustrate (see, *e.g.*, *Reporters Comm. for Freedom of the Press* v. *American Telephone & Telegraph Co.*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979); *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978); *LaRouche* v. *Webster*, 566 F. Supp. 415, 417 (S.D.N.Y. 1983)), no lesser restriction on judicial power can apply where federal criminal investigative activities are concerned. See *Allen* v. *Wright*, 468 U.S. at 760.

As we noted in our petition (at 24-27), no "extraordinary circumstances" can be found on the *undisputed facts* in this case. As the court of appeals itself found, petitioners clearly had a legitimate investigative purpose in this case, to wit, "preventing voter registration fraud" (Pet. App. 19a); there is no "evidence that * * * the Government intended to deny or abridge [respondents'] right to vote" (*id.* at 21a); and "the government officials did not violate [any] 'clearly established' rights" by their conduct of the investigation (*id.* at 24a). Accordingly, there is no basis for subjecting petitioners to additional proceedings in the district court.

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

APRIL 1987

"extraordinary circumstances." See *City of Los Angeles* v. *Lyons*, 461 U.S. at 112; *Rizzo* v. *Goode*, 423 U.S. at 379. That is the situation here.

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No. 86-1217 (4)

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OCTOBER TERM, 1986

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Rec'd proposed Order granting motion for leave to amend complaint, filed July 22, 1982 .....

Plaintiff's *NOTICE OF APPEAL*, filed July 22, 1982 .....

Defendant U.S.'s opposition memorandum to motion to amend complaint and application for TRO, filed July 23, 1982 .....

ORDER: Plaintiff's motion for leave to file a second amended complaint is—*Granted.*, with respect to the tenth claim for relief contained in the second amended complaint; subject however to Judge Williams' power to strike Plaintiff's second amended complaint upon reconsideration of this Order . . . Plaintiff's application for a

TRO is—*Denied.*, without prejudice to Plaintiff's right to present the application to Judge Williams, filed July 26, 1982 .....

Plaintiff's *SECOND AMENDED COMPLAINT*, filed July 29, 1982 .....

Defendant's notice of motion and motion for Summary Judgment and for dismissal filed September 24, 1982 .....

Defendant's Russoniello and Ilchert motion for Summary Judgment and/or dismissal, filed September 24, 1982 .....

Plaintiff's motion for leave to amend complaint, filed November 30, 1982 .....

Plaintiff's memorandum of points and authorities in opposition to Defendant's motion for Summary Judgment and for Dismissal., and in support of motion for leave to amend complaint, filed November 30, 1982 .....

Defendant U.S.'s reply brief to Plaintiff's response to motion for Summary Judgment and Partial Summary Judgment, filed December 8, 1982 ...

Defendant U.S.'s responses to motion for leave to amend complaint, filed December 8, 1982 .....

MINUTE ORDER: Defendant's motion to dismiss—*GRANTED.*, Court to issue memo and opinion, filed December 17, 1982 .....

ORDER: That Plaintiff's motion to amend is *DENIED.*, Plaintiff's motion concerning Section 5 of the Voting Rights Act is—*DENIED.*, Defendant's motion for Summary Judgment is *GRANTED.*, Judgment shall be entered for the Defendants, filed September 14, 1983 .....

MEMORANDUM: in support of Order granting summary judgment, filed September 14, 1983 ..

JUDGMENT: That Judgment shall be entered for the Defendants, filed September 14, 1983 .....

Plaintiff's *NOTICE OF APPEAL,* filed November 10, 1983 .....

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS; CHINESE FOR AFFIRMATIVE ACTION; AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; WILLIAM A. O'MALLEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR CONTRA COSTA COUNTY; LON UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; ARLO SMITH, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY; JAY PATTERSON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN FRANCISCO COUNTY; JOHN MEEHAN, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR ALAMEDA COUNTY; JAMES RIGGS, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR ALAMEDA COUNTY; WILLIAM D. CURTIS, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR MONTEREY COUNTY; ROSS UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR MONTEREY COUNTY; JAMES D. BOITANO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR NAPA COUNTY; BARBARA GREENSLAKE, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR NAPA COUNTY;

KEITH SORENSON, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN MATEO COUNTY; MARVIN CHURCH, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN MATEO COUNTY; ARTHUR DONNER, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CRUZ COUNTY; RICHARD (DICK) NEAL, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CRUZ COUNTY; GENE L. TUNNEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SONOMA COUNTY; EVE LEWIS, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR SONOMA COUNTY; LOUIS BERGNA, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; GEORGE A. MANN, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CLARA COUNTY; DAVID ILCHERT, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE IN THE SAN FRANCISCO BAY AREA, DEFENDANTS.

CLASS ACTION FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF RE DENIAL OF CIVIL RIGHTS

I

INTRODUCTION

1. By this action plaintiffs seek to enjoin federal and local public officials from engaging in discriminatory practices and policies aimed at preventing Hispanic-Americans and Chinese-Americans from participating in the electoral process. These illegal practices and policies have specifically focused on persons and groups who have requested and encouraged the use of bilingual election materials provided under federal and state law. Despite defendants' knowledge that these practices and policies

would violate plaintiffs' constitutional rights, defendants have steadfastly refused to halt a clandestine and discriminatory investigation of citizens of Hispanic and Chinese descent. Such practices, unless enjoined and declared illegal under the First, Fifth, Fourteenth and Fifteenth Amendments to the United States Constitution, the Voting Rights Acts of 1870, 1965 and 1975, as well as Article I, Section 1 of the California Constitution, will cause not only *irreparable injury* to these individuals but effectively deny their right to participate in the electoral process to vote.

II. JURISDICTION

2. Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1343(3) and § 1343(4); the rights sought to be protected are guaranteed by the First Amendment, Fifteenth Amendment, the equal protection and due process clauses of the Fourteenth and Fifth Amendments, as well as Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000(d), and 42 U.S.C. § 1971 and § 1973. Jurisdiction is also invoked pursuant to 42 U.S.C. § 1971(d) which grants jurisdiction to district courts in actions seeking to enforce voting rights, and under 28 U.S.C. § 1361 since this is an action to compel an officer of the United States to perform a duty owed to plaintiffs. Plaintiffs also invoke the pendent jurisdiction of the court in connection with their claim that defendants' actions violate the right to informational privacy under the California Constitution, Article I, Section 1.

III. PARTIES

Plaintiffs

3. Plaintiff JOSE J. OLAGUES is a United States Citizen and a resident of Concord, California. He was born in Mexico and became a naturalized citizen of the

United States in 1965. He is able to understand, read, write, and speak English and he is fully conversant and literate in his native tongue which is Spanish. Plaintiff Olagues has requested the use of bilingual voting election materials, and has participated in California's electoral process since 1966.

4. Plaintiff Hispanic Coalition for Human Rights is a broad based non-profit association of Hispanic organizations and persons of Mexican American descent residing in the San Francisco Bay Area. The Coalition's basic objective is to secure the civil rights of Hispanics, particularly with respect to voting and immigration matters. As such, its members are vitally interested and affected by the actions of defendants in investigating persons who have requested election materials in languages other than English. The Coalition represents such groups as the Mexican American Political Association, the National La Raza Lawyers Association, the League of United Latin American Citizens (LULAC), and other Hispanic groups, all of whom have members affected by the activities alleged herein. In attempting to encourage Americans of Hispanic descent to register and vote, the members of the coalition have aided and advised persons of the availability of bilingual election materials. The coalition members also, from time to time, utilize bilingual election materials.

5. Chinese for Affirmative Action is a San Francisco based non-profit, non-partisan, tax-exempt voluntary membership organization dedicated to protecting the rights of Chinese Americans and to promoting equal employment opportunities for members of the Chinese community. Founded in 1969, Chinese for Affirmative Action has members who are non-English speaking citizens who utilize bilingual election materials and whose voting rights are protected by the 1975 amendment to the Voting Rights Act. Chinese for Affirmative Action has expended considerable time, funds and resources to monitor

compliance by the San Francisco Registrar of Voters with respect to the bilingual election provision of the Voting Rights Act and to ensure that its members partake of election materials in a language other than English. Chinese for Affirmative Action members have been intimidated and discouraged from participating in the June 1982 primary and in turn have been dissuaded from encouraging prospective Asian-American voters from registering and voting. The actions by defendants directly undermines and prevents Chinese for Affirmative Action from carrying out its objectives.

6. The San Francisco Latino Voter Registration Education Project (hereafter "Latino Voter Project") is a coalition of San Francisco Hispanic groups that is presently conducting a non-partisan registration drive aimed at registering as many Hispanics as possible before the June primary election and thereafter the national election in California. The Latino Project is vitally interested in having Hispanic citizens partake of the electoral process and exercise their legal right to register and vote. The Project, with its coalition members, is vitally interested in the activities herein alleged, and stands to be affected by the investigation and intimidation of persons who request bilingual ballots. The actions of defendants directly undermine and prevents the Latino Voter Registration Education Project from carrying out its objectives.

Defendants

7. Defendant JOSEPH P. RUSSONIELLO is sued individually and in his official capacity as the United States Attorney for the Northern District of California.

8. Defendants JOHN MEEHAN, WILLIAM O'MALLEY, WILLIAM D. CURTIS, JAMES D. BOITANO, ARLO SMITH, KEITH SORENSON, ARTHUR DONNER, LOUIS BERGNA and GENE L. TUNNEY are all sued individually and in their official

capacities as District Attorneys for the Counties of Alameda, Contra Costa, Monterey, Napa, San Francisco, San Mateo, Santa Cruz, Santa Clara and Sonoma, respectively.

9. Defendants JAMES RIGGS, LON UNDERWOOD, ROSS UNDERWOOD, BARBARA GREENSLATE, JAY PATTERSON, MARVIN CHURCH, RICHARD NEAL, GEORGE MANN and EESIE LEWIS, are all sued individually and in their official capacities as Registrars of Voters for the Counties of Alameda, Contra Costa, Monterey, Napa, San Francisco, San Mateo, Santa Cruz, Santa Clara, and Sonoma, respectively.

10. Defendant DAVID ILCHERT is sued individually and in his official capacity as District Director for the Immigration and Naturalization Service for the San Francisco Bay Area.

IV

CLASS ACTION ALLEGATIONS

11. Plaintiffs bring this action as a class action under Rule 23(b)(2). There are three classes.

a) As a first class, Plaintiff Jose J. Olagues and the class he represents are Hispanic American and Chinese American persons of foreign birth who have registered to vote or have voted within the last five years and have indicated a preference for utilizing election materials in a language other than English. Said class is limited to those individuals who reside in the following counties: Contra Costa, Alameda, San Francisco, Santa Cruz, Monterey, San Mateo, Napa, Sonoma and Santa Clara, and who, as a result of the actions taken by defendants, have been or will be subjected to governmental investigations and possible unwarranted criminal prosecutions by virtue of having their names culled from voter registration lists and sub-

mitted to governmental authorities because they have requested election materials in a language other than English.

b) As a second class, plaintiffs Jose J. Olagues, Hispanic Coalition for Human Rights, Chinese for Affirmative Action, and San Francisco Latino Voter Registration Education Project represent those Hispanic-American and Chinese-American individuals who have voted or expressed a desire to vote in future elections and who, as a result of the actions taken by defendants, will either forego from expressing a desire to utilize election materials in a language other than English, or decline to participate in the electoral process.

c) As a third class, plaintiffs Hispanic Coalition for Human Rights, Chinese for Affirmative Action and San Francisco Latino Voter Registration Education Project represent those persons or groups acting individually or in concert with others who are involved in voter education projects with Americans of Hispanic or Chinese descent and by virtue of such activity inform individuals of the availability of bilingual election materials. Said class is composed of all such groups and individuals who will be subject to investigation by virtue of defendants activities.

12. The requirements of Rule 23 of the Federal Rules of Civil Procedure are met herein in that:

a) The classes sought to be certified are so numerous that joinder of all members is impracticable.

b) There are questions of law and fact common to members of both classes, and such questions clearly predominate over any questions affecting only individual members of both classes.

c) The claims of the representative plaintiffs are typical of the claims of each class.

d) The representative plaintiffs will fairly and adequately protect the interests of each class.

e) The parties opposing the classes have acted on grounds generally applicable to each class, thereby making appropriate final injunctive and declaratory relief with respect to each class as a whole.

V

FACTUAL ALLEGATIONS

13. On April 19, 1982 defendant Russoniello initiated a *secret probe* of Hispanic-American and Chinese-American voters by sending a letter to nine Bay Area District Attorneys (a copy of which is attached as Exhibit A). The probe sought to investigate citizens of Hispanic and Chinese descent who had falsely registered and which may affect, in defendant Russoniello words, "the June election such that the results would be subject to court challenge."

14. This investigation was allegedly precipitated by a February 1981 study conducted by defendants Santa Clara County District Attorney and County Registrar of Voters. This study allegedly disclosed that of a test sample of 100 newly registered persons of foreign birth in Santa Clara county, several individuals were determined not to be U.S. citizens. The study was not revealed to the public nor was it made available to defendant district attorneys or registrars in initiating the investigation.

15. The April 19, 1982 letter requested each District Attorney and Registrar of Voters in the counties of Alameda, Contra Costa, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz and Sonoma to compile a list of Hispanic-American and Chinese-American persons within those counties whose recent affidavits of registration reflect (1) a foreign country as the place of birth, and (2) a preference for election materials in a language other than English.

16. The defendant District Attorneys were then to forward twenty-five "selected" names to defendant Russoniello for transmittal to defendant Ilchert. After a scan by the United States Immigration and Naturalization Service to determine whether such Hispanic-Americans and Chinese-Americans were eligible to vote, persons for whom there exists some doubt as to their voter eligibility would be referred back to defendant District Attorneys for investigation.

17. The actions of defendants to date have followed the procedures and time table stated in defendant Russoniello's letter. Accordingly, names of individuals who have requested bilingual ballots have been transmitted by defendant District Attorneys and defendant Registrars of Voters to defendant Russioniello. These names of persons have been reviewed by defendant Ilchert and the Immigration and Naturalization Service, and these Hispanic-Americans and Chinese-Americans have been, or will be subject to investigation by defendant District Attorneys.

18. Despite the questionable validity of a fourteen month old study involving a test sample of only 100 newly registered persons of foreign birth, Defendant Russoniello has insisted on maintaining this investigation only against persons requesting election information in Spanish or Chinese.

19. Such an investigation of persons who were foreign born and may have been ineligible to vote was not based on any reasonable suspicion that foreign born voters were committing fraud nor that the problem of voter irregularities was limited only to persons of Hispanic-American or Chinese-American descent. By focusing the investigation only on this select group of individuals, limited by national original and race to Hispanic-Americans and Chinese-Americans, defendants have acted willfully with a malicious intent to violate the legal rights

of plaintiffs, and have arbitrarily discriminated against those individuals who had requested bilingual election materials, i.e., citizens of Hispanic and Chinese descent.

20. Plaintiffs have suffered, and will suffer, irreparable injury because of the threat that they and their association with political groups may be investigated if federal defendants are "unable to state with surety" (see Exhibit A) that the former are naturalized citizens eligible to vote.

21. Defendants, all of whom are versed in the First Amendment rights of individuals to associate with groups and entities, as well as the right of individuals to participate in the electoral process free from racial or national origin stigmas, knew or should have known that such actions would single out only citizens of Hispanic or Chinese descent. Despite such knowledge, defendants pursued such an investigation in reckless disregard of the individuals rights of such individuals.

22. As a result of these clandestine investigations, defendants also planned to question citizens of Hispanic and Chinese descent who had their names pulled from voter registration lists as to which "special interest" groups had registered them, why they had registered, and whether such individuals had been induced to register under false pretenses. Such an investigation, as defendants knew, would not only violate the individual's right of association and right to refuse to answer question as to political activity, but also effectively intimidate, threaten and coerce Hispanic and Chinese-American groups actively involved in encouraging individuals to participate in registering and voting.

23. The activities undertaken by defendants were not undertaken pursuant to any grand jury investigation, nor was there any authorization given to those officials to undertake such an investigation by California State officials or the United States Attorney General. Such actions

by defendants were undertaken outside the scope of their authority and were an abuse of discretion.

24. Each of the defendants herein have participated in, or are beneficiaries of, programs that receive federal financial assistance.

VI

REQUISITES FOR RELIEF

25. Plaintiffs have suffered, and will continue to suffer, irreparable harm, injury, and loss as a direct and proximate result of the conduct of defendants complained of herein.

26. Plaintiffs lack a plain, speedy, or adequate remedy at law to prevent such irreparable harm, injury and loss, and will continue to so suffer unless this Court enjoins the conduct complained of.

27. An actual and substantial controversy exists between plaintiffs and defendants:

a. Plaintiffs contend that the conduct of defendants complained of herein is unlawful and unconstitutional for the reasons set forth herein.

b. Defendants contend that their conduct as described above is lawful and constitutional in all respects and fully intend to continue such conduct.

28. By reason of the acts of defendants complained of herein, plaintiffs have suffered actual harm and damage.

29. Defendants have committed the acts complained of herein willfully, maliciously, and in bad faith, under color of authority of the United States and the State of California, with full knowledge that said acts were violative of the constitutional and statutory rights alleged herein.

VII

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Violative of Fifteenth Amendment)

30. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 29, as set forth above.

31. By reason of the actions of the defendants as set forth herein above, Defendants have violated the Fifteenth Amendment.

SECOND CLAIM FOR RELEIF

(Equal Protection)

32. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 29, as set forth above. Defendants have participated in the compilation of a list of individuals on voter registration lists who have or will have used bilingual election materials. Such a list was compiled only of citizens of Hispanic or Chinese descent, since by necessity only these individuals request bilingual election materials. Despite defendants' knowledge that voting irregularities may have occurred with respect to all naturalized citizens, defendants intentionally selected only citizens of Hispanic or Chinese descent for investigation.

33. This classification of voters is invidious and arbitrary in that it causes a discriminatory investigation of plaintiffs and the class they represent solely on the basis of race, color or national origin. As to the Federal defendants, such discriminatory practices deny plaintiffs equal protection of the law in violation of the Fifth Amendment to the United States Constitution. As to the State defendants, such practices violate the Fourteenth Amendment.

THIRD CLAIM FOR RELIEF

(Due Process)

34. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 29, as set forth above.

35. The investigation herein described was undertaken by defendants without any reasonable basis to believe that citizens of foreign birth requesting bilingual ballot material were illegally registering to vote. Such investigation, undertaken in a clandestine manner, is in violation of plaintiffs' due process rights under the Fifth and Fourteenth Amendment to the United States Constitution as against the state defendants and the Fifth Amendment against the federal defendants.

FOURTH CLAIM FOR RELIEF

(Violation of Voting Rights Act, 42 U.S.C. § 1971)

36. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 29, as set forth above.

37. The actions of all defendants as set out above have effectively intimidated, threatened, and coerced citizens of Hispanic and Chinese ancestry from participating in the electoral process. Such actions, made under color of state or federal law, have been undertaken on the basis of race, color and national origin in violation of the Voting Rights Act of 1860, 42 U.S.C. §1971, et seq., and particularly 42 U.S.C. § 1971(b).

FIFTH CLAIM FOR RELIEF

(Violation of Voting Rights Act, 42 U.S.C. § 1973)

38. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 29, as set forth above.

39. The actions of all defendants as set out above have effectively intimidated, threatened, and coerced plaintiffs by establishing qualifications to vote based on race and national origin as well as intimidating, threatening and preventing plaintiffs from aiding citizens of Hispanic and Chinese ancestry from participating in the electoral process in violation of 42 U.S.C. § 1973i(b).

SIXTH CLAIM FOR RELIEF

(Violation of Bilingual Election Requirements, 42 U.S.C. 1973 aa-1a)

40. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 29, as set forth above.

41. The actions of the defendants as set out above have effectively discriminated against citizens of language minorities, in violation of 42 U.S.C. § 1973 aa-1a, et seq., which prohibits such practices.

SEVENTH CLAIM FOR RELIEF

(Violation of First Amendment)

42. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 29, as set forth above.

43. The actions of defendants as set out above have effectively threatened, coerced and intimidated plaintiffs in their efforts to seek out citizens of Hispanic and Chinese ancestry for purposes of urging them to participate in the electoral process. Defendants' actions, which threaten to investigate how plaintiff groups are registering citizens of Hispanic and Chinese descent, are and will be violating plaintiffs' right of association and political expression in violation of the First Amendment to the United States Constitution.

EIGHTH CLAIM FOR RELIEF

(42 U.S.C. 2000(d))

44. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 29, as set forth above.

45. The actions of defendants have subjected plaintiffs to discriminatiion on the basis of race, color or national origin under a program or activity receiving federal financial assistance in violation of 42 U.S.C. § 2000(d).

NINTH CLAIM FOR RELIEF

(Right of Privacy)

46. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 29, as set forth above.

47. By defendants selecting names of individuals seeking election material in languages other than English for the purpose of secret investigations, defendants have initiated, encouraged and condoned a violation of Article I, Section 1 of the California Constitution which guarantees a right of privacy to every person in California. Such acts by defendants violated plaintiffs' right of privacy in that using a person's request for a bilingual ballot was for an entirely unauthorized, unrelated purpose.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray:

1. For a temporary restraining order prohibiting defendant Russoniello, his successors, employees, agents, and all persons working in concert or participation with him, from requesting, seeking, soliciting, or requiring that defendant District Attorneys and Registrars forward to the office of the United States Attorney the names of any persons solely on the basis of their having sought bilingual

election materials in their respective counties, and further requiring defendants Russoniello and Ilchert, their successors, employees, agents, and defendant District Attorneys and Registrars, and all persons working in concert or participation with them, to maintain, under seal pending further order of the Court, all information previously gathered solely on the basis of a person having requested bilingual ballot material and to refrain from transferring said information to any other person or agency, and further prohibiting the defendant District Attorneys and County Registrars, their successors, employees, agents, and all persons working in concert or participation with them, from taking any further action to facilitate, aid, or otherwise assist the office of the United States Attorney or the Immigration and Naturalization Service to obtain names of persons requesting bilingual ballot materials, and to show cause before the court why they should not be enjoined in the future.

2. For an order certifying that plaintiffs may properly represent all other persons similarly situated and that the action may be maintained as a class action.

3. For a preliminary injunction prohibiting defendant Russoniello, his successors, employees, agents, and all other persons working in concert or participation with him from requesting, seeking, soliciting or requiring that defendant District Attorneys and Registrars forward to the office of the United States Attorney or the Immigration and Naturalization Service the names of any persons solely on the basis of their having sought bilingual election materials in their respective counties, and further requiring that defendants Russoniello and Ilchert, and defendants District Attorneys and Registrars, maintain under seal pending final disposition of the case, all information previously gathered and refrain from transferring the information by any person or agency except under court order, and further prohibiting defendant District Attorneys and Registrars, their successors, employees, agents

and all persons working in concert or participation with them from taking any further actions to facilitate, aid, or otherwise assist the office of the United States Attorney or the Immigration and Naturalization Service to obtain names or intimidate persons requesting bilingual ballot materials.

4. For a preliminary injunction restraining the defendants and each of them, their successors, employees, and all persons working in concert or participation with them, from taking any action to threaten, intimidate, or coerce any persons or group from exercising their right or attempting to exercise their right to receive bilingual election materials under state or federal law.

5. For a judgment pursuant to 28 U.S.C. § 2201-2202 declaring the respective rights of the parties.

6. For a permanent injunction prohibiting defendant Russoniello, his successors, employees agents, all other persons working in concert or participation with him, from requesting, seeking, soliciting or requiring that defendant District Attorneys and Registrars forward to the office of the United States Attorney or the Immigration and Naturalization Service the names of any persons solely on the basis of their having sought bilingual election materials in their respective counties, and further requiring that defendants Russoniello and Ilchert, and defendants District Attorneys and Registrars, destroy, expunge and obliterate all information previously gathered, and refrain from transferring the information to any person or agency except under court order, and further prohibiting defendant District Attorneys and Registrars, their successors, employees, agents and all persons working in concert or participation with them from taking any further actions to facilitate, aid, or otherwise assist the office of the United States Attorney or the Immigration and Naturalization Service to obtain names or intimidate persons requesting bilingual ballot materials.

7. For statutory damages according to law for each violation of the Voting Rights Act.

8. For costs of suit and reasonable attorneys fees.

9. For all other relief that the court finds equitable and proper.

DATED: May 7, 1982

Respectfully submitted,

JOAQUIN G. AVILA
MORRIS J. BALLER
HECTOR VASQUEZ
SUSAN E. BROWN
RONALD T. VERA
Mexican American Legal Defense and Educational Fund

MARGARET C. CROSBY
ALAN L. SCHLOSSER
AMITAI SCHWARTZ
American Civil Liberties Union Foundation of Northern California

LAWRENCE B. GARCIA

By: RONALD T. VERA
Attorneys for Plaintiffs

Exhibit A

U.S. Department of Justice

United States Attorney
Northern District of California

16th Floor Federal Building – Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

Branch Office
675 N. First Street, Suite 508
San Jose, California 95112

April 19, 1982

Honorable William A. O'Malley
District Attorney
Contra Costa County
Post Office Box 670
Courthouse
Main and Court Street
Martinez, California 94553

Re: Primary Election: June 8, 1982 –
Possible Inappropriate Voter Registration
of Aliens

Dear Mr. O'Malley:

Your county, together with the counties of Alameda, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz and Sonoma, has previously been identified as effected by the provisions of 42 United States Code, Section 1973aa-1a and following, commonly known as the Bilingual Election Requirement. Those provisions require that each effected county provide "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process,

including ballots," in the Spanish language and, in the case of San Francisco County, in the Chinese language in addition to English.

As a corollary to the effected counties' efforts to comply, several groups have undertaken voter registration drives targeted toward registering individuals whose primary language is Spanish or Chinese and we do not challenge their right to do so. However, an investigation undertaken by the Santa Clara County District Attorney at the request of Voter Registrar George Mann beginning in about February 1981, disclosed that with respect to a test sample of 100 newly-registered persons of foreign birth, twenty were determined not to be U.S. Citizens and eleven others could not be located. The investigation disclosed that those persons who were not U.S. Citizens, but who did register erroneously, believed they were eligible to vote because they were either married to U.S. Citizens or had been residents of the United States for a long period of time.

We are concerned, as I am sure you are, that if as many as thirty percent of the newly-registered foreign born persons vote even though they are not eligible to do so, especially given the expected intensive effort to register non-English speaking persons, the elections to be held June 8 may be so effected that the results are subject to court challenge. Any successful challenge will mean considerable expense, both to the counties and to the candidates involved therein.

It is too early to sound any alarm but there is, in my judgment, a sufficient basis for our undertaking some mutual effort to determine the extent to which persons are being registered who are not entitled to vote. If such be the case it seems to me that the fault or blame, if any need be leveled, lies with the registration affidavit form itself in that even though question No. 6 asks for the state in the USA or foreign country of birth, there is no follow-up

question eliciting information as to the date and place of naturalization if a foreign country *is* the place of birth. Even though the affidavit contains the statement, "I am a citizen of the United States . . . ," as has previously been shown, a significant number of persons believed that citizenship was synonomous with residency and/or could be acquired by marriage alone. (I enclose a copy of the affidavit which I understand is used in one form or another in your county for your information.)

Before any accurate assessment can be made that we have a problem with respect to the June election, we should at least sample the newly-registered persons of foreign birth to determine what percentage of them are in fact eligible to vote and to that end I propose the following:

1. Through your good offices, the Registrar of Voters should be asked to submit at random the names and dates of birth of twenty-five persons of new registration, whose affidavits of registration reflect (1) a foreign country as the place of birth and (2) a preference for election materials in a language other than English.

2. Those names and dates of birth should be forwarded to us not later than April 30, 1982.

3. Upon receipt, we will forward the twenty-five names received from your Registrar and the twenty-five names received from the Registrars in all other counties aforenamed to the Immigration and Naturalization Service who will scan their computer for the purpose of determining the number of persons known to be naturalized or, in the alternative, known to be resident aliens ineligible to vote. They will report their results to us and we will pass them on to you by no later than May 7, 1982.

4. As to each person with respect to whom we are unable to state with surety that he/she has been naturalized, a follow-up interview should be conducted by your office to determine (1) the basis upon which they claim citizenship and entitlement to vote and (2) in cases in

which they are unable to prove citizenship, what representations were made to them by Registrars as to their qualification to vote. These follow-up interviews should be given priority so that all investigations are completed by May 21.

5. On May 24 we will check with each DA's office to determine the results of their investigation and will report to each office on May 25 the results of the overall investigation.

6. Depending upon those results and the extent to which inappropriate registration is determined, we should decide by mutual agreement what further action to take. In this connnection, a joint press conference alerting the general public and prospective unauthorized voters in particular of the results of our investigation might be appropriate. Alternatively, the respective Registrars may choose to take some action with regard to each potential voter effected by our survey to require proof of citizenship before permitting that person to vote. The various alternatives will require considerable discussion and your input as well as the input of the Registrar of Voters who might be required to take some action.

For our part, we do not contemplate initiating prosecutions against individual registrants as we are empowered to do pursuant to the provisions of 42 U.S.C., Section 1973dd-3(c), but will seriously consider such prosecutions against persons whom the evidence shows deliberately "conspired with another individual for the purpose of encouraging the giving of false information in order to establish the eligibility of any individual to register . . ." Your would of course be free to pursue whatever action you deemed appropriate as provided for in Section 29200 of the California Elections Code.

Because of the sensitivity of this matter and because it is premature to suggest that the June 8 election is in jeopardy, we will refrain from issuing any press advisory or making

any statement regarding this ongoing investigation and will consult with you before taking any such action. I would appreciate your doing likewise and hearing from you if you consider some media notification to be appropriate at this time.

If you have any question concerning the foregoing or would like to discuss the matter further, Chief Assistant United States Attorney William T. McGiven (556-8477) will be coordinating the effort on our end and will make himself available to discuss planning with you.

Very truly yours,

/s/ JOSEPH P. RUSSONIELLO
Joseph P. Russoniello
United States Attorney

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2101

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS; CHINESE FOR AFFIRMATIVE ACTION; AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; WILLIAM A. O'MALLEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR CONTRA COSTA COUNTY; LON UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; ARLO SMITH, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY; JAY PATTERSON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN FRANCISCO COUNTY; JOHN MEEHAN, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR ALAMEDA COUNTY; JAMES RIGGS, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR ALAMEDA COUNTY; WILLIAM D. CURTIS, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR MONTEREY COUNTY; ROSS UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR MONTEREY COUNTY; JAMES D. BOITANO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR NAPA COUNTY; BARBARA GREENSLAKE, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR NAPA COUNTY;

KEITH SORENSON, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN MATEO COUNTY; MARVIN CHURCH, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN MATEO COUNTY; ARTHUR DONNER, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CRUZ COUNTY; RICHARD (DICK) NEAL, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CRUZ COUNTY; GENE L. TUNNEY INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SONOMA COUNTY; EVE LEWIS, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR SONOMA COUNTY; LOUIS BERGNA, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; GEORGE A. MANN, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CLARA COUNTY; DAVID ILCHERT, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE IN THE SAN FRANCISCO BAY AREA, DEFENDANTS.

DECLARATION OF AL BORVICE, CHAIRPERSON OF SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT

I, Al Borvice, declare:

1. I am the duly authorized chairperson of the SAN FRANCISCO LATINO VOTER REGISTRATION AND EDUCATION PROJECT (hereinafter "SFLVREP" or "Project"). SFLVREP is a politically nonpartisan coalition of the San Francisco chapter of the Mexican American Political Association and the Latino Democratic Club of San Francisco. The sole purpose of the Project is educating the San Francisco Latino community about the electoral process and registering Latinos to vote.

2. On April 2, 1982, the Project officially started its voter registration and education drive for the June 1982 primary election. The Project will finish its current drive to register voters on May 10, 1982—the deadline for registering to vote in the June primary election.

3. The Project depends upon volunteers and one paid staff person to achieve its objectives of voter education and registration.

4. The Project's primary method of voter registration is central site registration whereby volunteers register individuals in heavily-traveled areas, such as shopping centers, bus stops, churches, street fairs, and other public events. Volunteers also register voters by going door to door in targeted precincts in the Mission District of San Francisco. Before the Project permits volunteers to register voters, the Project staff trains the volunteers in completing voter registration forms properly.

5. As of May 3, 1982, the Project had registered approximately 1600 voters. A substantial proportion of these individuals is Latino. Many of the individuals that the Project registered to vote either requested bilingual ballots or were born in a foreign country.

6. Based upon the Project's week-by-week registration statistics, the Project anticipated that the most successful week for registering voters would be the fifth and final week of the drive—the week of May 3, 1982.

10. On May 3, 1982, or thereabouts, I became aware of the United States Attorney's investigation of individuals who register to vote and who either had requested a bilingual ballot or were born in a foreign country.

11. The United States Attorney's investigation has caused, and will continue to cause, irreparable harm to the Project's efforts to register Latino voters. This harm occurs because, as knowledge of the investigation spreads through the Latino community, it will discourage those Latinos from registering who do not want to be the subject

of a special investigation by the federal government. Many Latinos do not trust the government's accumulation and use of personal information about an individual's political activity. Many Latino citizens in San Francisco are familiar with governments in other countries where information about voting and other political activity is used to harass, intimidate, and oppress voters. These Latinos need encouragement to vote under the best of circumstances. These Latinos do not want to be the subject of an investigation by the federal government prompted solely because they registered to vote and need a bilingual ballot or were born in a foreign country. The efforts of SFLVREP to register as many Latinos as possible for the primary election has been, and will continue to be, undermined by the special investigation conducted by the United States Attorney.

12. This week—the week of May 3, 1982—the Project has experienced a noticeable decrease in the number of volunteers who have helped register voters in the previous weeks of the registration drive.

13. In spite of the United States Attorney's investigation, the Project will continue its voter registration and education drive and attempt to register as many Latino voters as we can under the circumstances.

I declare under penalty of perjury that the foregoing is true and correct and was executed in San Francisco, California.

Dated: May 6, 1982.

/s/ AL BORVICE

Al Borvice

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS; CHINESE FOR AFFIRMATIVE ACTION; AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; WILLIAM A. O'MALLEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR CONTRA COSTA COUNTY; LON UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; ARLO SMITH, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY; JAY PATTERSON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN FRANCISCO COUNTY; JOHN MEEHAN, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR ALAMEDA COUNTY; JAMES RIGGS, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR ALAMEDA COUNTY; WILLIAM D. CURTIS, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR MONTEREY COUNTY; ROSS UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR MONTEREY COUNTY; JAMES D. BOITANO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR NAPA COUNTY; BARBARA GREENSLAKE, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR NAPA COUNTY;

KEITH SORENSON, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN MATEO COUNTY; MARVIN CHURCH, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN MATEO COUNTY; ARTHUR DONNER, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CRUZ COUNTY; RICHARD (DICK) NEAL, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CRUZ COUNTY; GENE L. TUNNEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SONOMA COUNTY; EVE LEWIS, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR SONOMA COUNTY; LOUIS BERGNA, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; GEORGE A. MANN, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CLARA COUNTY; DAVID ILCHERT, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE IN THE SAN FRANCISCO BAY AREA, DEFENDANTS.

DECLARATION OF GEORGE CANTU, CO-CHAIRMAN OF THE CONTRA COSTA COUNTY CHAPTER OF THE HISPANIC COALITION FOR HUMAN RIGHTS

DECLARATION OF GEORGE CANTU

I, GEORGE CANTU, declare as follows:

1. That my name is George Cantu and I currently reside at 622 30th Street in Richmond, California. I have resided in Contra Costa County for 39 years.

2. During my 39 years residing in Contra Costa County I have been active in political affairs and have on several occasions exercised my legal right to vote.

3. I am currently serving as Co-chairman of the Hispanic Coalition for Human Rights in Contra Costa County. This organization is the Contra Costa County

chapter of the Hispanic Coalition for Human Rights (hereafter "coalition") which is a non-profit association of Hispanic organizations. The Coalition's basic objective is to secure the civil rights of Hispanics, particularly with respect to voting and immigration matters.

4. A portion of the activities of the Coalition is providing information to Hispanics and others about their eligibility to vote. These activities include informating interested persons of their right to receive voter information and to cast a ballot in the Spanish language.

5. Since May 1, 1982, I have become personally aware of several inquiries made to the Coalition from persons and service organizations with questions about the current investigations by the United States Government into persons requesting bilingual voter materials in Contra Costa County, as well as questions regarding the highly publicized sweeps of the United States Immigration and Naturalization Service.

6. As a member of the Coalition I am deeply concerned that these investigations may lead to an inquiry from federal and local law enforcement officials about the nature and type of communication between the Coalition and persons requesting information about their eligibility to register to vote.

7. The fear instilled by the potential of such inquiries has had a chilling effect upon the activities of the Coalition and the fulfillment of its objectives. This investigative activity is particularly egregious because it comes at a time immediately preceding the May 10, 1982 closing date for voter registrations for the June primary elections.

8. The actions of federal and Contra Costa County officials violate my and the Coalition's legal rights of association in intimidating our voter registration activities by threats of prosecutorial investigations.

I declare that the foregoing is true and correct and that if called as a witness I could competently testify thereto.

Executed this 7th day of May, 1982, at San Francisco, California.

/s/ GEORGE CANTU

George Cantu

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2101

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS; CHINESE FOR AFFIRMATIVE ACTION; AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; WILLIAM A. O'MALLEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR CONTRA COSTA COUNTY; LON UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; ARLO SMITH, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY; JAY PATTERSON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN FRANCISCO COUNTY; JOHN MEEHAN, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR ALAMEDA COUNTY; JAMES RIGGS, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR ALAMEDA COUNTY; WILLIAM D. CURTIS, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR MONTEREY COUNTY; ROSS UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR MONTEREY COUNTY; JAMES D. BOITANO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR NAPA COUNTY; BARBARA GREENSLAKE, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR NAPA COUNTY;

KEITH SORENSON, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN MATEO COUNTY; MARVIN CHURCH, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN MATEO COUNTY; ARTHUR DONNER, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CRUZ COUNTY; RICHARD (DICK) NEAL, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CRUZ COUNTY; GENE L. TUNNEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SONOMA COUNTY; EVE LEWIS, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR SONOMA COUNTY; LOUIS BERGNA, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; GEORGE A. MANN, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CLARA COUNTY; DAVID ILCHERT, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE IN THE SAN FRANCISCO BAY AREA, DEFENDANTS.

DECLARATION OF HENRY DER IN SUPPORT OF TEMPORARY RESTRAINING ORDER

I, HENRY DER, declare as follows:

1. My name is Henry Der. I am the Executive Director of Chinese for Affirmative Action. I have held this position with Chinese for Affirmative Action since August, 1974.

2. On May 6, 1982, I met with U.S. Attorney Joseph Russoniello to discuss his office's probe of foreign-born registered voters who have requested bilingual ballots in nine San Francisco counties.

3. On behalf of Chinese for Affirmative Action, I requested Mr. Russoniello to cease immediately this investigation of voters requesting bilingual ballots. Further-

more, I asked that, upon receipt of 25 names of foreign-born registered from each of the nine San Francisco Bay Area District Attorney's Offices, he not forward these names to the Immigration and Naturalization Service for verification of naturalization. Lastly, I requested that, if some of these names do not appear on Immigration and Naturalization Service naturalization lists, the U.S. Attorney's Office not submit these names back to the local District Attorney's offices for further investigation.

4. Mr. Russoniello indicated to me that, based on a survey of foreign-born voters conducted by the Santa Clara County Registrar of Voters last February, 1981, he decided to launch a probe of non-citizen registered voters residing in nine San Francisco Bay Area counties, obligated under the 1975 amendments to the Voting Rights Act of 1965 to conduct bilingual elections for non-English speaking citizens.

5. In spite of my requests for his office to cease the probe of foreign-born registered voters requesting bilingual ballots, Mr. Russoniello indicated to me that he was proceeding with his investigation.

I declare under penalty of perjury that the foregoing is true and correct and that if called as a witness, I would competently testify thereto.

Executed this 12th day of May, 1982, at San Francisco, California.

/s/ HENRY DER

Henry Der

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2101

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS; CHINESE FOR AFFIRMATIVE ACTION; AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; WILLIAM A. O'MALLEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR CONTRA COSTA COUNTY; LON UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; ARLO SMITH, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY; JAY PATTERSON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN FRANCISCO COUNTY; JOHN MEEHAN, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR ALAMEDA COUNTY; JAMES RIGGS, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR ALAMEDA COUNTY; WILLIAM D. CURTIS, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR MONTEREY COUNTY; ROSS UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR MONTEREY COUNTY; JAMES D. BOITANO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR NAPA COUNTY; BARBARA GREENSLAKE, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR NAPA COUNTY;

KEITH SORENSON, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN MATEO COUNTY; MARVIN CHURCH, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN MATEO COUNTY; ARTHUR DONNER, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CRUZ COUNTY; RICHARD (DICK) NEAL, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CRUZ COUNTY; GENE L. TUNNEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SONOMA COUNTY; EVE LEWIS, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR SONOMA COUNTY; LOUIS BERGNA, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; GEORGE A. MANN, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CLARA COUNTY; DAVID ILCHERT, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE IN THE SAN FRANCISCO BAY AREA, DEFENDANTS.

DECLARATION OF LUANNE LASH

I, Luanne Lash, declare:

1. I am an employee of the Mexican American Legal Defense and Educational Fund and on May 5 and 6, 1982 contacted certain individuals regarding the list of foreign born voters requesting bilingual ballots which had to be sent by Bay Area District Attorneys to U.S. Attorney Russoniello.

2. On Wednesday, May 5, 1982, I talked to John Phillips, Assistant District Attorney for Monteray County. He informed me that a list of names had been sent to the U.S. Attorney's office the same day he had received the list from the Registrar of Voters which was on May 3, 1982.

3. The same day, May 5, 1982, I talked to James Boitana, District Attorney for Napa County. He said he received a list of names of people who had requested bilingual election materials on April 27th and sent this list on May 5th to Russoniello.

4. I then talked to Don Gartner, an attorney in Santa Cruz County who said he received a list of all 79 individuals who were foreign born and had requested bilingual ballots. However, he told me they did not meet all three criteria in that none of them were recent registrants for the year of 1982. At that time, he did not know what they were going to do with the list. He stated it would be up to the District Attorney to decide whether to send in all 79 names, select 25 at random or not send any. He did not know when this decision would be made.

5. On Thursday, May 6th, I spoke with Eve Lewis the County Registrar of Voters for Sonoma County. She told me she had sent a list of sixteen names which met the criteria requested by Russioniello on April 23rd to the District Attorney's office.

6. Following that conversation, I spoke with James Riggs, the County Registrar of Voters for Alameda County who said he sent a list of 300 names to the District Attorney's office before the April 30th deadline. Immediately following that call, I spoke to Robert Platt, Senior Deputy District Attorney, who told me thirty-four (34) registered affidavits had also accompanied the 43 page computer print out of names, which met all three criteria requested by Russoniello. He said he then sent the list "out" before the deadline.

7. From San Francisco County, I spoke to Jay Patterson, the San Francisco County Registrar of Voters. He said he sent the list requested by Russoniello directly to the U.S. Attorney's office the week after the deadline. He informed me that District Attorney Arlo Smith had requested him to send 35 names. Only 4 of the 35 had requested bilingual ballots.

8. From San Mateo county, I spoke with Robert Kasper, the Assistant County Registrar of Voters who referred me to Marvin Church. In the conversation with Church, he stated that the list of twenty-five names was compiled by Tower Road and that he sent it directly to the U.S. Attorney's office with a copy sent to Keith Sorenson the District Attorney.

I declare under penalty of perjury that the foregoing is true and correct and was executed in San Francisco, California.

May 7, 1982	/s/ LUANNE LASH
Date	Luanne Lash

EXHIBIT "A"
DECLARATION OF JOSE J. OLAGUES

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS; CHINESE FOR AFFIRMATIVE ACTION; AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; WILLIAM A. O'MALLEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR CONTRA COSTA COUNTY; LON UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; ARLO SMITH, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY; JAY PATTERSON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN FRANCISCO COUNTY; JOHN MEEHAN, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR ALAMEDA COUNTY; JAMES RIGGS, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR ALAMEDA COUNTY; WILLIAM D. CURTIS, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR MONTEREY COUNTY; ROSS UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR MONTEREY COUNTY; JAMES D. BOITANO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR NAPA COUNTY; BARBARA GREENSLAKE, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR NAPA COUNTY;

KEITH SORENSON, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN MATEO COUNTY; MARVIN CHURCH, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN MATEO COUNTY; ARTHUR DONNER, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CRUZ COUNTY; RICHARD (DICK) NEAL, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CRUZ COUNTY; GENE L. TUNNEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SONOMA COUNTY; EVE LEWIS, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR SONOMA COUNTY; LOUIS BERGNA, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; GEORGE A. MANN, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CLARA COUNTY; DAVID ILCHERT, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE IN THE SAN FRANCISCO BAY AREA, DEFENDANTS.

DECLARATION OF JOSE J. OLAGUES

I, JOSÉ J. OLAGUES, declare as follows:

1. My name is José J. Olagues. I am the plaintiff in the above-entitled action. I was born on February 12, 1945 in Mazatlan, Mexico. I am 37 years old and a naturalized Citizen of the United States of America. I reside at 4112 Tulare Court, Concord, California 94521, where I have lived for the past eight (8) years. I have lived in Concord, California for the past ten (10) years. I am married to Beverly Olagues, a United States Citizen, and have been married for seventeen (17) years. My wife and I have three (3) children: Tanya, 13; Khristina, 8; and Jose B., 7. They are all Citizens of the United States of America.

2. I am employed by Pacific Telephone Company, 370 Third St., San Francisco, California as an analyst in the accounting department. I have worked for Pacific Telephone Company for the past eleven (11) years, being employed in my present position as an analyst for the past year and a half.

3. I am a veteran of the Armed Forces of the United States. I was drafted into the U.S. Army on January 18, 1967, released from active duty in 1969, and was honorably discharged in 1973 from reserve status. I attained the rank of Staff Sargent "E"-6. My duties while in the military were administrative instructor.

4. In the Summer of 1960, my family moved to Hayward, California from Guadlajara, Mexico. I was 15 years old at the time. My mother, Refugio Olagues, is also a Citizen of the United States of America, born in Sims, California. I was a legal resident alien of the United States when I moved to California. I am bilingual in Spanish and English. In the Fall of 1965, at Oakland, California, I became a naturalized Citizen of the United States of America. I was 20 years old at the time. When I turned 21, I registered to vote in San Leandro, California in Alameda County. Since 1972 I have been registered to vote in Concord, California.

5. In 1981 I was a candidate for election to the Mount Diablo Unified School District Board of Education. In accordance with the procedures for running for elected office, I made a candidate's statement that would appear in the voter information packet and sample ballot distributed to registered voters in the District. I wrote my candidate statement in English and knew that it would be translated into Spanish for inclusion in the Spanish language voting information packet that is distributed to persons who specifically request voter material in the Spanish language. Being aware that sometimes translations are not entirely accurate, I wanted to read my candidate statement in the

Spanish language voter information packet, so I requested the Spanish language voter information material and ballot on August 27, 1981. Although I had been registered to vote since 1972 in Concord, California, I had to re-register to vote in August, 1981 because I had requested the material in the Spanish language. I have been receiving voter registration material in the Spanish language ever since I re-registered to vote.

6. On May 1, 1982 I read a newspaper article printed in the *East Bay Today* in which reporter Carol Benfell quoted United States Attorney, Joseph Russoniello, as acknowledging that the United States Government had begun an investigation of suspected voter fraud. The article further quoted the U.S. Attorney as having asked the District Attorneys in nine (9) Northern California counties to obtain names of persons requesting bilingual voter information. From that list, the District Attorneys were to "select" twenty-five (25) names to be forwarded to the United States Immigration and Naturalization Service for review and ultimately sent back to local law enforcement agencies for investigation. (A copy of the article I read is attached as Exhibit "A" to my declaration).

7. On May 4, 1982, I was shown a copy of an April 19, 1982 letter from U.S. Attorney Russoniello to Contra Costa County District Attorney, William A. O'Malley, (Attached as Exhibit "A" to the complaint). I was also shown District Attorney O'Malley's response to Russoniello's letter. Attached to the response letter of District Attorney O'Malley was a list of names of voters who had been "selected" for the investigation. I observed my name and address on the attached list.

8. I fear that now that my identity has been given to the United States Government for review, and I will soon be contacted by local law enforcement agencies to prove my citizenship or to determine if I have been contacted by registrars of voters or special interest groups.

9. I will suffer irreparable injury if the federal government is permitted to communicate the results of the U.S. Immigration and Naturalization Service reviews to District Attorney O'Mally on May 7, 1982 as indicated in U.S. Attorney Russoniello's April 19, 1982 letter.

10. Discovery that my request for bilingual voter information will involve me in an investigation by the United States Attorney, and the United States Immigration and Naturalization Service has caused me great anxiety and concern. I am deeply troubled over the fact that I, as well as other United States Citizens, will become targets of investigations for exercising our legal right to bilingual voter information.

11. I declare, under penalty of perjury, that the foregoing is true and correct and that if called as a witness, I would competently testify thereto.

Executed this 7th day of May, 1982 at San Francisco, CA.

/s/ JOSE J. OLAGUES

Jose J. Olagues

BEST AVAILABLE COPY

Oakland Tribune / EASTBAY TODAY May 1, 1982/Oakland, California

Secret voter probe bared

U.S. attorney sifts bilingual rolls for illegal aliens

By Carol Bonfell
Tribune Staff Writer

SAN FRANCISCO — The U.S. attorney's office here has launched a clandestine investigation of all non-English speaking persons in nine Northern California counties who have requested bilingual voting information for the coming election.

The purpose of the investigation is to keep aliens who are in the country illegally and permanent alien residents who are not eligible to vote out of the polling places next June, explained U.S. Attorney Joseph Russoniello.

The investigation will affect only Spanish and Chinese-speaking voters, because bilingual ballots have been authorized in only those two languages, according to the secretary of state's office.

Angry civil rights groups charge Russoniello is conducting a witch hunt which will intimidate bilingual citizens who have a right to vote.

The investigation began just days prior to "Operation Jobs," a five-day series of raids by the Immigration and Naturalization Service for illegal aliens at their places of employment.

Russoniello denied any connection between the two activities, but said his agency would share any information uncovered about undocumented workers with the INS.

"It is appalling and shocking to have an 'Operation Ballotbox' coming on the heels of 'Operation Jobs,'" said Dorothy Ehrlich, executive director of the American Civil Liberties Union of Northern California.

"This creates a chilling effect where people will be fearful of registering to vote if they do not speak the language.

"The U.S. attorney's office is abusing its power by targeting all non-English speaking voters as suspects in criminal activity," she said.

The ACLU will formally request more information about the investigation from Russoniello, Ehrlich said.

The investigation began April 19 when Russoniello sent letters to district attorneys in the nine counties in his office's jurisdiction which prepare bilingual voting materials — San Francisco, Contra Costa, Alameda, Santa Cruz, Monterey, San Mateo, Napa, Sonoma and Santa Clara — asking them to compile the names of all persons requesting bilingual voting information.

In the letter, Russoniello asked the district attorneys to keep the letters secret from the press and the public until a more appropriate time.

When the Oakland Tribune/Eastbay TODAY obtained information about the letters and questioned Russoniello, he explained the investigation in detail.

The district attorney is to get the names of the bilingual voters from the county registrar of voters and select, at random, 25 names from the list for investigation, Russoniello said.

Those 25 names will be checked through the INS computer list of naturalized citizens. Any person not shown as naturalized will be personally interviewed by a law enforcement representative, "probably from the local agencies," Russoniello said.

A person who registers to vote knowing he or she is ineligible is committing a felony, Russoniello said.

If the random sampling shows people did not know they were ineligible but were misinformed, efforts will be made to see if they were misled by registrars of voters or special-interest groups, he said.

If a special-interest group is intentionally misleading people about their eligibility, that group could also be prosecuted for fraud, Russoniello said.

At the very least, the investigation could lead to improved registration forms or letters to members of the target group explaining more fully the eligibility laws, he said.

Russoniello said he had wanted to keep the information from the press to avoid any premature speculation or conclusions.

"We may not find any pattern at all," he said. "This is not the time to castigate anyone."

Russoniello got the idea for the investigation from a similar voter fraud investigation conducted by the district attorney's office in Santa Clara County last year, he said. That investigation disclosed an estimated three thousand to five thousand bilingual persons had registered to vote who were ineligible, said Ray Cunningham, deputy district attorney in charge of the investigation of all types of voter fraud.

Cunningham said no one was prosecuted and the investigation was dropped because all those queried had believed they were eligible either because they had married American citizens or because they had lived in this country for decades.

"This is outrageous," said Henry Der, executive director of Chinese for Affirmative Action, a San Francisco-based rights group. "There is no evidence to indicate bilingual voters are even a problem."

Der, a member of the California State Bar's Board of Governors, said he believed the investigation was unconstitutional. "We (the affirmative action group) would encourage every district attorney not to participate in this witch hunt."

The Alameda County District Attorney's office sent Russoniello a 43-page computer printout with names of all bilingual voters in the county April 27, telling him to make his own random selection, according to a spokeswoman for the office.

William O'Malley, Contra Costa district attorney, sent Russoniello the 25 names as requested out of the 490 voters there who had requested bilingual ballots, his office said.

San Francisco District Attorney Arlo Smith did not respond to telephone calls.

According to the secretary of state's office, 132,000 Spanish speaking persons and 9,000 Chinese speaking persons requested bilingual ballots in the 1980 elections.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

[FILED JULY 22, 1962]

DECLARATION OF LUIS DIAZ-INFANTE

I, LUIS DIAZ-INFANTE, declare as follows:

1. My name is LUIS DIAZ-INFANTE. I was born in El Grullo, Jalisco, Mexico. I am 48 years old and a naturalized citizen of the United States. I live at 425 Navajo Drive, Salinas, California 93906. I have lived at my current address 4½ years.

2. I have been employed by Johnson Associated, Inc., in Salinas, California as a mechanic's welder for the past 4 years. Before that I was a farmworker.

3. I was a permanent resident alien of the United States since August 25, 1960 until October 31, 1978, when I became a naturalized citizen. My main reason for becoming a U.S. citizen was to obtain the right to vote. I consider this a very precious right as it gives me the opportunity to express my point of view and to help myself, my family and my community.

4. I first registered to vote in March, 1979. I have voted at every primary and general election ever since. My wife and I are involved in the schools in our area and school board and other local elections are a primary concern to us. We are interested in electing persons that are sensitive to the needs of the children of farmworkers who are very often in need of bilingual instruction.

5. Although I speak and read English to a limited extent, I require interpreters as I would rather not depend on my poor English speaking ability in dealing with institutions or legal matters. By contrast, I am confident in my ability to speak, read, write and deal with important matters in Spanish, my native language.

6. Toward the end of May, 1982, I read an article in the Salinas Californian which talked about a federal investigation of voters who had requested foreign language ballots. Since my wife and I had both requested our ballots in Spanish, the news was somewhat alarming. My wife and I called an attorney with California Rural Legal Assistance to ask about the investigation. She told us that the Monterey County District Attorney had sent a list of 25 persons to the federal attorney in San Francisco but that the list was not available. She also told us that the matter had been taken to court and that the investigation may be illegal.

7. This week I heard that the District Attorney of this county would be investigating those people who had not been determined to be citizens. It is possible that my wife or I may be on the list. I think this investigation is wrong, since we had a right to request our ballots in Spanish, without the threat of a criminal investigation. We are citizens who have committed no crime. I do not think that any citizen should have to answer any questions of the District Attorney, simply because we didn't ask for a ballot in English.

8. I want to know whether I have a right to refuse to cooperate if I am one of the persons on the lists.

9. I have always respected and obeyed the laws of this country. But, I resent government interference with my right to privacy. It makes me lose confidence in our democratic government institutions which are supposed to protect its citizens, rather than subject us to discriminatory practices.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on this 16th day of July, 1982, at Salinas, California.

/s/ LUIS DIAZ-INFANTE
Luis Diaz-Infante

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

[FILED JULY 22, 1982]

DECLARATION OF EVELIA DIAZ-INFANTE

I, EVELIA DIAZ-INFANTE, declare as follows:

1. My name is EVELIA DIAZ-INFANTE. I was born in El Grullo, Jalisco, Mexico. I am 47 years old and a naturalized citizen of the United States. I live at 425 Navajo Drive, Salinas, California 93906 where I have lived for the past 4½ years. I have lived in Salinas, California for 21 years.

2. I have been seasonally employed by Bud Antle, Inc. in Salinas as a celery packing shed worker since 1965. Before this, I worked in the fields in Salinas and other areas of California on a seasonal basis.

3. On August 25, 1960, I became a permanent resident alien of the United States. Although I have lived in the United States continuously since then, I speak, read, and write in my native tongue, Spanish. I am not as fluent in English and I feel more confident when speaking and reading in Spanish.

4. After becoming a permanent resident of the United States, I wanted to be an active member of my community. Through my involvement in the education of my children, I slowly began to learn about the workings of American institutions and my constitutional right to be

treated equaliy in this country. I became involved in parent groups in the schools my children attended and continue to take an active interest in educational matters. Recently, I was asked by members of the Mexican American community in Salinas to consider being a school board candidate in the district where I live.

5. In October of 1978, my husband and I both became naturalized U.S. citizens. Our primary motive for becoming citizens was that we would have the right to vote. At the first opportunity, we registered to vote. This was in March of 1979. We both voted in the June primaries that year. I studied the ballot carefully and was very prepared when I went to vote. I remember feeling proud, excited, and somewhat nervous. That year I voted in November and have voted every year ever since. When given the option to receive my voter information packet in Spanish, I will always request it as I am more fluent in Spanish. This year I received the Spanish language voter information packet.

6. On May 28, 1982 I read a short article printed in the Salinas Californian that dealt with an investigation of people who requested voter information in a language other than English. The article said that a list of 21 names of such people in Monterey County has been reviewed by the INS and that only 6 of those names had been found to be citizens. My husband and I called the CRLA office to ask someone about this investigation. One of the attorneys there told me that we should not worry that the matter had been taken to court and that she would keep us informed.

7. I now understand that the 15 people on the list submitted by Monterey County will be investigated and that that investigation has already begun.

8. I am very upset about the fact that my husband and I may be on the list and may be investigated by the District Attorney's office. I know I have nothing to fear but I do not want to be bothered in that way just because I requested my voter information in Spanish. I do not like to

be treated differently than other citizens who speak English. I consider this nothing less than discrimination against people who speak another language. Every time I experience something like this, I question whether my U.S. citizenship and right to vote are actually making any difference in our lives. This kind of action against us makes me want to protect myself in the privacy of my home, family, and friends and discourages my community involvement.

9. I am also concerned about the effect of this on other Mexican Americans in this area. Some of my friends have not become citizens because they do not think that their vote will make any difference. Hearing about this will only convince them of this. Others who are already citizens will probably not register to vote after hearing of this. As a result, the Mexican American community as a whole will suffer.

I declare under penalty of perjury that the foregoing is true and correct and was executed in Salinas, California.
DATED: July 15, 1982

/s/ EVELIA DIAZ-INFANTE
Evelia Diaz-Infante

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

[FILED JULY 22, 1982]

DECLARATION OF LYDIA GONZALEZ

I, LYDIA GONZALEZ, declare as follows:

1. I am an attorney with the Migrant Farmworker Project of California Rural Legal Assistance, Inc., in Salinas, California.

2. On May 19, 1982, I accompanied Richard Criley, Juan Martinez and Pedro Lopez at a meeting with Monterey County District Attorney William Curtis.

As Monterey County was one of the nine northern California counties included in U.S. Attorney Joseph Russoniello's probe of foreign-born registered voters who requested bilingual ballots, we requested the meeting to discuss his office's cooperation with the probe.

3. Mr. Curtis indicated that to date, his office had called Ross Underwood, Monterey County Registrar, to obtain a list of 25 names of foreign born registered voters who had requested a foreign language ballot. He stated that he believed the names were obtained from the registrar by telephone and were submitted to the U.S. Attorney's office in San Francisco as requested. He added that his office did not keep a list of the names submitted. He stated that he expected to receive information on the

registrants from the U.S. Attorney's office, but did not know exactly when it would be sent.

4. We voiced our concerns about the probe and specifically, about his office's cooperation with the probe, as serious legal questions had been raised about its propriety. Moreover, we indicated that many people, such as Juan Martinez and Pedro Lopez, had recently focused their efforts on the registration of new Hispanic voters and that word of this investigation might have a chilling effect on these registrant's willingness to vote in the June primaries and on continued efforts to register Hispanic voters in Monterey County. We urged Mr. Curtis to discontinue any futher cooperation with the probe.

5. Mr. Curtis indicated that the only thing his office had done thus far was to send the requested list to Mr. Russoniello's office and that he did not anticipate that anything more would be done. If he should receive information indicating a serious problem in Monterey County, however, he would investigate.

6. On May 28, 1982, I read an article in the Salinas Californian indicating that of the 21 names on the list sent by the Monterey County District Attorney's office to Mr. Russoniello's office, only six were positively determined to be legally registered to vote.

7. On or about May 31, 1982, I called Mr. Curtis to determine what his office intended to do after receiving this information. As Mr. Curtis was not in, I spoke to John Phillips, the Assistant District Attorney, who indicated that their office intended to conduct an investigation as soon as their bilingual investigators were free.

8. On the following week, I spoke to Mr. Curtis who indicated that before pursuing the investigation, they had requested from the Monterey County Counsel's office a determination as to possible legal impediments.

9. On July 7, 1982, I called Mr. Curtis again to ask whether his office was going ahead with the investigation.

He stated that his office had begun the investigation, but that he was unaware of the details since he had been out of his office for a week and had just retuned. I then requested a copy of the list of 15 people who would be investigated and he denied my request.

I declare under penalty of perjury that the foregoing is true and correct and that if called as a witness, I would competently testify thereto.

Executed on this 16th day of July, 1982, at Salinas, California.

/s/ LYDIA GONZÁLEZ
Lydia González

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

[FILED JULY 22, 1982]

DECLARATION OF JUAN D. MARTINEZ

I, JUAN D. MARTINEZ, declare as follows:

1. My name is JUAN D. MARTINEZ, I live at 737 Beldon Street, Gonzales, County of Monterey, California.

2. In 1980 and 1981 I worked with a group of volunteers in the Salinas Valley involved in organizing voter registration committees in Castroville, Salinas, Gonzales, Chualar, Soledad, Greenfield, King City and San Lucas.

3. The work of the committees was to educate people about voting and to register eligible voters. This was done by going door to door in each of the communities in the Salinas Valley. Our 1980 and 1981 efforts effected the registration of over 3,000 people, most of which were Spanish surnamed.

4. I recruited volunteers to register voters and coordinated the activities of the drive. We had about 150 volunteers. I also registered thirty voters, twenty-nine of whom were Spanish surnamed.

5. Each one of the committees was trained in registering voters and in training other volunteers to register people.

6. The volunteers were also trained by Ross Underwood from the Monterey County Election Department. Mr. Underwood visited with each and every group that was involved in this process. In addition to giving this training, Mr. Underwood also swore in over 100 deputy registrars throughout the Salinas Valley.

7. Most of our work was in Hispanic neighborhoods. Our first question was whether the person was already registered to vote. If the answer was "no," we asked whether the person was a citizen. The next question was whether they were on parole or ex-felon.

8. Volunteers were encouraged to explain to voters about the availability of bilingual ballots.

9. I found that foreign-born citizens needed extra-encouragement to register, that they knew less about their rights than other citizens did, and that the availability of Spanish language ballots was an incentive for them to register.

10. In May of 1982, I heard from other volunteer registrars that people were going to be investigated for possible voter fraud and that voter registrars would also be investigated.

11. I am very upset at our local officials that are cooperating with an investigation that has the effect of a scare tactic. This only serves to discourage people from registering to vote, voting, and registering other voters.

12. I am angry that only the non-English speaking have been singled out for this investigation. I can not help but wonder whether this is a deliberate attempt to discourage minorities to use their voting rights. It was hard enough trying to convince people that their vote can make a difference before this investigation started.

13. Now it will be even harder to get volunteers to help in the effort to get eligible Hispanics to participate in the electoral process in the county. I think this investigation will discredit our voter registration drive in the community.

I declare under penalty of perjury that the foregoing is true and correct and was executed in Salinas, California.

Dated: July 16, 1982.

/s/ JUAN D. MARTINEZ
Juan D. Martinez

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; ET AL., PLAINTIFF,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; ET AL., DEFENDANTS.

[FILED JULY 22, 1982]

DECLARATION OF RUDOLPH G. RODRIGUEZ

I, RUDOLPH G. RODRIGUEZ, declare as follows:

1. That my name is RUDOLPH G. RODRIGUEZ and I currently reside at 256 Sierra Drive, Walnut Creek, California 94596. I have resided in Contra Costa County for 10 years.

2. That I am active in the political affairs of Contra Costa County as a member of the Hispanic Coalition for Human Rights.

3. That on behalf of the Hispanic Coalition for Human Rights I spoke with Contra Costa County District Attorney William O'Malley on May 1, 1982. At that time I initiated a conversation with the District Attorney regarding the investigation of persons who had requested bilingual ballots. Since May 1, 1982, I have remained in contact with the District Attorney and the Contra Costa County Registrar of Voters Lon Underwood with regard to the investigation and have obtained information and documents relating to the investigation from them.

4. Specifically, on May 28, 1982 I spoke to District Attorney O'Malley, and in the course of our conversation he indicated that his office had received a letter from United States Attorney Russoniello requesting interviews of certain Contra Costa residents who had been identified as part of the bilingual voters investigation. District Attorney O'Malley also said that Registrar Underwood had that letter.

5. The same day, I called Registrar Underwood's office. Underwood was out, and I spoke to his assistant Bob Delavati. Mr. Delavati offered to provide me with a copy of the letter from the United States Attorney.

6. Later the same day, May 28, 1982, I went to Mr. Delavati's office and picked up a copy of the letter from Mr. Russoniello to Mr. O'Malley. A copy of that letter is attached hereto as Exhibit A.

I declare, under penalty of perjury, that the foregoing is true and correct and that if called as a witness, I would competently testify thereto.

Executed this 21st day of July 1982 at Walnut Creek, California.

/s/ RUDOLPH G. RODRIGUEZ
Rudolph G. Rodriguez

Exhibit A

U.S. Department of Justice

United States Attorney
Northern District of California

16th Floor Federal Building – Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

Branch Office
675 N. First Street, Suite 508
San Jose, California 95112

May 26, 1982

Honorable William A. O'Malley
District Attorney
Contra Costa County
Post Office Box 670
Courthouse
Main and Court Street
Martinez, California 94553

Re: Primary Election: June 8, 1982 –
Possible Inappropriate Voter Registration
of Aliens

Dear Mr. O'Malley:

I refer you to my letter to you dated April 19, 1982 and our subsequent written and telephonic communications regarding the above-captioned subject.

INTRODUCTION

Let me express my appreciation to you and to your staff and your colleagues in the County Registrar's Office without whose assistance and cooperation we would not

have been able to progress as far as we have in determining whether a problem exists that requires further action.

CONCLUSION

I regret but am compelled to say that in my judgment there *is* a serious problem that demands further attention.

ENCLOSURES

Enclosed find the following materials:

1. A spread sheet showing the overall statistical data developed from the respective submissions and the follow-up performed (an explantion of certain critical aspects follows).
2. A printout list of the information developed specifically with respect to your submission.
3. A copy of my May 6, 1982 letter to Secretary of State Eu stating my investigative objectives, the scope of the investigation, and a recommendation for modifying the Registration Affidavit format to minimize the apparent confusion registrants have faced and to eliminate fraud.
4. An interview sheet designed to elicit needed information regarding (a) eligibility to vote and (b) circumstances surrounding the involved registration.

THE SPREAD SHEET

Seven of the nine counties submitted information substantially in accordance with my April 19 request. Santa Cruz provided the names of over seventy persons who asked for bilingual voting materials but no birth dates. As soon as we receive the additional information we will be able to analyze the data we develop from the appropriate record check. San Francisco submitted seventy names; thirty-five of those represented U.S. born persons so there was no need to find out how many of these were U.S. citizens, presumably all were; of the other thirty-five, three re-

quested voting material in languages other than English and they are included in the analysis. The other names submitted were of little use in identifying any present problem of registering persons unlawfully.

Of the 168 names submitted for which bilingual voting materials were requested, 55 (37%) were positively identified as naturalized citizens, 45 (29%) were identified either positively as illegal aliens, probably legal permanent residents (LPRs) or possibly either illegal aliens or LPRs. For 68 persons (39.9%) neither the INS nor the FBI Identification Division had any record of these persons.

The spread sheet shows that further federal record checking is being done in our effort to further identify persons in columns No. 4, 5 and 6.

The absence of any record in either the FBI or INS systems is not conclusive that the person is ineligible to vote but it is presumptive of that fact for the reason that until February 1982 all persons who were fingerprinted in the course of pursuing naturalization had their fingerprints forwarded to the Identification Division of the FBI where they were permanently stored. If their fingerprints are not found in the Identification Files, a strong presumption exists that they have not been naturalized. This does not, of course, eliminate the possibility that they have "derivative citizenship" acquired because one or both parents were U.S. citizens and they acquired citizenship automatically thereby, but the interviews should establish such a fact, if it is a fact.

THE INTERVIEW

a) *Conducting of Interviews*

There is not now any reason to believe that any of the persons registered to vote who are subjects of interviews have deliberately made a false statement regarding their eligibility though such evidence may develop later.

If for any reason you are unable to conduct the interviews I would appreciate your earliest advice of this fact so other arrangements can be made to get this done.

b) *The Interview Sheet*

For consistency and to facilitate the obtaining of information I recommend you use the Interview Sheet enclosed. It is self-explanatory and focuses on (a) the basis claimed for citizenship, (b) the name of the person at the time of naturalization, (c) the date and location of naturalization, (d) identification of any documents supporting the claim of citizenship and, in the case of persons who are not citizens (e) the circumstances surrounding their registering to vote.

PRESS ADVISORY

You will recall that I earlier advised by April 19 letter that I saw no reason to issue any press advisory until after the interviews were conducted (page 3, paragraph 6), but delaying any statement will not be possible now in light of the extensive coverage this investigation has already received. I propose to advise the media on Friday, May 28, 1982 what the preliminary results are and that further investigation has been requested and is being undertaken. Any further thoughts on this matter would be appreciated.

Even on the basis of the preliminary review and before deciding that the "NO RECORDS" are, for the most part, ineligible to vote, I suggest you advise your respective Registrars of the results to alert them to the facts.

I will be in touch with you further by phone to discuss any other appropriate action.

Very truly yours,

/s/ JOSEPH P. RUSSONIELLO

Joseph P. Russoniello
United States Attorney

Enclosures

COUNTY	TOTAL # OF NAMES SUBMITTED (1)	TOTAL # REQ'ING BILINGUAL BALLOTS (2)	POSITIVE IDENT AS CITIZENS (3)	LPRs (4)	ILLEGAL ALIEN (5)	OTHER QUESTIONABLE (6)	PHIB. MILITARY DEPENDANTS (7)	NO FBI OR INS RECORD (8)	FED CHECK PENDING (9)	TO BE INTERVIEWED (10)
ALAMEDA	32	32	10	4	1	5	0	12	5	22
CONTRA COSTA	25	25	12	1	1	3	0	8	2	12
SAN MATEO	25	25	8	2	0	5	0	10	5	17
SANTA CLARA	25	25	8	1	1	0	0	15	1	17
NAPA	23 (22)	23 (22)	8 (7)	3	1	4	0	7	2	16
MONTEREY	21	21	6	5	0	1	0	9	1	15
SONOMA	16 (15)	15	4	3	1	2	0	6 (5)	1	11 (10)
SAN FRANCISCO	35	3	0	0	0	1	0	2	0	3
TOTALS		168	55	19	5	21		68		
			12.7% of total		45			39.9% of total		
					27.4% of total					

INFORMATION FROM COUNTY

Name	DPOB
ALEJANDRE, Ramon	01/24/45 Mexico
ANDAZOLA, Jesus Jose	01/14/50 Mexico
APARICIO, Maria D.	03/05/45 El Salvador
ARBELAEZ, Hernando	06/25/18 Colombia
BERNAL, Lucille Amaral	08/22/11 Mexico
CAMPO, Mirta ✓	06/22/39 Argentina
MARTINEZ, Armando Ortiz	01/01/57 Mexico
NORBABY, Teresa C. ✓	10/19/39 Colombia
OLAGUES, Jose J.	02/12/45 Mexico
ORNELAS, Pedro	03/15/61 Mexico
PALLARES, Mercedes Alvarez ✓	07/26/03 Ecuador
PENA, Florencio Flores	12/19/10 Mexico
PENA, Irma ✓	12/15/59 Mexico
PEREZ, Victor Manuel	06/29/55 Mexico
PLATA, Arnoldo Flores ✓	10/07/36 Mexico
REYES, Crispina Maria ✓	10/30/48 Mexico
RIBEIRO, Enriqueta ✓	09/23/33 Mexico
MARROQUIN, Edgar Dario Rivas	09/25/59 Guatemala
RODLEDO, Josue P.	08/21/05 Mexico

A COUNTY

USINS RECORDS*

Name	File No.	Status
ALEJANDRE-Navarro, Ramon	A23 067 614	Illegal
ANDAZOLA, Jesus Jose	A30 581 251	USC
APARICIO, Maria Delia	A13 690 670	USC
ARBELAEZ, Hernando	A17 293 135	USC
BERNAL, Lucille Anaral	A01 202 452	USC
NO RECORD		
MARTINEZ-Ortiz, Armando	A19 206 027	USC
NO RECORD		
OLAGUES, Jose J.	A12 262 186	USC
ORNELAS, Pedro	A21 357 176	USC
NO RECORD	(2)	
PENA, Florencio F.	A01 944 798	USC
NO RECORD		
PEREZ-Perez, Victor Manuel	A30 773 620	USC
NO RECORD	(1) A 22973	
NO RECORD		
NO RECORD		
MORROQUIN, Edgar Dario Rivas	A24 254 106	LPR-File in Los Angeles
ROBLEDO-Perez, Josue	A04 949 269	USC

CONTRA COSTA COUNTY

ROBLES, Jaime A. ✓	05/26/37	Mexico	ROBLES-Lizarraga, Jaime Armando	A34 531 062	LPR
RODRIGUEZ, Maria Gloria	10/21/33	Guatemala	RODRIGUEZ, Maria Gloria P.	A10 483 762	USC
RODRIGUEZ, Roberto ✓ ANGELES ARELLANO RODRIGUEZ	02/15/59	Mexico	NO RECORD		(1) NO CIVIL, NO FILE FOUND
RONQUILLO, Arageli ✓	02/18/50	Mexico	NO RECORD		
RONQUILLO, Facundo ✓	11/27/50	Mexico	NO RECORD		
SOTO, Maria Mercedes ✓	10/15/00	Chile	SOTO-SANCHEZ, Maria Mercedes	A13 116 378	(1) Index Card only, file located.

*NOTE: DOB is omitted to save space. Unless noted, DOB in USINS Records corresponds exactly to County information.

LPR = Lawful Permanent Resident
USC = United States citizen

✓ RECOMMEND INTERVIEW

BEST AVAILABLE COPY

May 6, 1982

Honorable March Fong Eu
Secretary of State
State of California
Sacramento, California 95814

Dear Secretary Eu:

This will acknowlege receipt of your letter of May 4, 1982. I wholeheartedly share with you appreciation of the fact that the right to vote is one of the most precious rights guaranteed by the Constitution of the United States to all citizens and I join with you in your commitment to see to it that all persons of whatever ethnicity are guaranteed the right to vote if they choose to exercise it.

Several of the matters and concerns expressed in your letter require a response and I apologize if my remarks are redundant to what I have earlier said in attempting to explain to the media and to concerned citizens the objectives of this inquiry and the reasons for it.

In the first place, the investigation we undertook in conjunction with local District Attorney's offices was prompted by the investigation conducted by the District Attorney in Santa Clara County in 1981, which itself focused on non-English speaking persons who had registered to vote. The results of that limited probe suggested to us that a random sample survey of similarly situated registrants in other counties within the Northern District of California would be appropriate. The survey was limited to a review of public records and had as its sole purpose determining whether the unacceptable conditions uncovered during the Santa Clara probe were peculiar to that district or more widespread. It was made clear to the District Attorneys, and none seemed confused by our communication, that

we did not contemplate prosecution of any registrants for the reason that the Santa Clara probe suggested, as you correctly noted, that the registrants' conduct was innocent and most probably the result of ignorance or misinformation. We were concerned, and continue to be concerned, that if a problem of widespread inappropriate registration exists, there may be a pattern which suggests that certain particular registrars, characterized by the San Francisco Registrar of Voters Jay Patterson as "bounty hunters," might be deliberately and wilfully misrepresenting the prerequisites for voter eligibility in violation of 42 U.S. Code 1973i(c) and (d).

As you know, by agreement between the involved District Attorneys and this office and specifically because we saw no reason to signal an alarm without knowing more of the facts of possible impropriety, no one involved in the investigation made any public pronouncement that such a probe was underway. When the press did become aware of the investigation and made inquiry of the writer I reported as succinctly and clearly as I could the aforestated objectives and the limitations of the inquiry. Unfortunately, according to the reporter who wrote the first story who apologized to me later, there was considerable re-write to her story over which she had no control that resulted in an initial misimpression that this investigation was somehow linked to a recent Immigration and Naturalization Service probe of illegal aliens, that it was secret and that criminal prosecution against registrants was contemplated. Various groups picked up on this first article and, in my judgment, made precipitous and unwarranted accusations concerning the chilling effect the investigation would have on voter registration and/or voting by non-English speaking persons without first even inquiring of this office as to our true intent and objective. If anything adversely impacts a person's disposition to register and later to vote, it will not be this investigation, but the hysteria which has been

whipped-up by various special interest groups. And there is an inherent contradiction to this accusation . . . if persons have so little facility with the English language that voting materials in other languages are necessary to fully inform them so as to permit them the opportunity to cast an intelligent vote, how can these same persons be adversely impacted by an investigation or comments which have been in the English language only? If they are sufficiently versed in the English language to understand what has been said in the press in the last several days, then they most certainly must come away from exposure to that media with the clear belief and understanding that this investigation does not focus in on or intrude upon citizens who have acquired the right of citizenship by birth or naturalization.

Finally, I applaud your determination to take steps "to educate voter registration card distributors and the public generally that only United States citizens can register and vote," but I most respectfully suggest to you that merely printing a warning on the affidavits themselves that they are to be used by U.S. citizens only may not be enough to inform the prospective registrant who is foreign born that citizenship can only be acquired by birth or naturalization. It would certainly be preferable, and I do not intend to preempt your responsibilities in this regard in so saying, that the affidavit forms be changed to accommodate the foreign born person and his needs by providing a space where he can indicate the data of naturalization and city of naturalization. Many such persons have reported over the years the significant impression the naturalization proceeding has had on their lives, many considering it as important a date as their birthday, wedding day, etc. I understand from my Chief Assistant William T. McGivern who has been in touch with your assistant Tony Miller that so amending the affidavit was at one time contemplated by your office. If so, it is unfortunate that the idea was not

pursued further because inclusion of such a section on the affidavit would be of some assistance to the registrant who wasn't sure whether he was a citizen or not, but knew he had not been through the naturalization process so that that section would necessarily be left blank which would entitle the Registrar of Voters to either reject the affidavit or request the registrant to provide further specific additional information. Absent such a provision, the County Registrar of Voters is unable to determine from the face of the affidavit whether the foreign born person has been naturalized or not. I trust that the foregoing answers your inquiry. If I may be of any further assistance to you or you require any additional information, feel free to contact me at your convenience.

Very truly yours,

/s/ JOSEPH P. RUSSONIELLO

Joseph P. Russoniello
United States Attorney

INTERVIEW SHEET

NAME _____ DATE OF INTERVIEW _____

MAIDEN NAME (if applicable) _____

ARE YOU A CITIZEN OF THE U.S. YES ___ NO ___ NOT SURE ___

IF YOU ARE A CITIZEN, HOW DID YOU ACQUIRE IT?

a) BORN IN U.S. _____

b) NATURALIZATION _____

c) OTHER (explain) _____

_____

_____

_____

_____

IF BY NATURALIZATION,

a) FULL NAME WHEN NATURALIZED _____

b) PLACE WHERE NATURALIZED _____

c) YEAR OF NATURALIZATION _____

d) ANY DOCUMENTS? DESCRIBE _____

_____

IF NOT A CITIZEN, BUT REGISTERED TO VOTE,

a) DID SOMEONE ASSIST YOU IN REGISTERING? YES _____ NO _____

b) IF YES, WHO? _____

c) IF YES, BUT DON'T KNOW NAME OF PERSON, WHEN AND WHERE (e.g. door to door campaign, on street, supermarket, dance, political event, etc.)? _____

_____

d) DID PERSON IDENTIFY ORGANIZATION OR AFFILIATION? _____

e) IF SO, WHAT ORGANIZATION? _____

_____

NAME OF INTERVIEWER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

[FILED JULY 22, 1982]

DECLARATION OF MARIA VIRGINIA SALMON

I, MARIA VIRGINIA SALMON, declare as follows:

1. My name is MARIA VIRGINIA SALMON. I live in Salinas, Monterey County, California.

2. During 1980 and 1981 I worked as a volunteer with an unnamed association of individuals who organized to register voters within Monterey County.

3. I worked mostly in the Alisal area of Salinas, California. The Alisal area is comprised mostly of Spanish-surnamed people.

4. In 1981, I registered approximately 75 people and in 1982, I registered approximately 30 people.

5. The 1982 registration drive began on April 3, 1982 with a kickoff rally and a training session.

6. The registration was conducted on a door-to-door basis. The first two questions I asked every person were: "Are you registered to vote?" and, if the answer was no, "Are you a United States citizen?" Everybody that I registered indicated that they were citizens.

7. I told all Spanish-speaking persons about the availability of bilingual ballots and encouraged them to request bilingual ballots if it would enable them to understand more fully what their ballot choices were.

Approximately 20 out of the 105 people I registered requested bilingual ballots.

8. In May 1982, I read a newpaper article indicating that the United States Attorney's office, with the help of the local district attorneys, was conducting an investigation of people who had requested bilingual ballots. The article indicated voters in four counties, including Monterey County, were being investigated for possible voter fraud. A later article indicated that the focus of the investigation was going to be on people who helped register voters.

9. I am outraged that the U.S. Attorney and other officials are implying that I, and others who helped register voters, deliberately tried to get non-citizens to register. I am also angry that they may be harassing some of the people that I helped register.

10. I will continue to try to get people to register for the November election although I am certain it is going to be more difficult to get people to use bilingual ballots even in those instances where a bilingual ballot would help voters understand the issues better.

I declare under penalty of perjury that the foregoing is true and correct and was executed in Salinas, California.
DATED: July 13, 1982

/s/ MARIA VIRGINIA SALMON
Maria Virginia Salmon

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; HISPANIC COALITION FOR HUMAN RIGHTS; CHINESE FOR AFFIRMATIVE ACTION; AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, EVELIA DIAZ-INFANTE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED: JUAN D. MARTINEZ, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; WILLIAM A. O'MALLEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR CONTRA COSTA COUNTY; LON UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; ARLO SMITH, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY; JAY PATTERSON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN FRANCISCO COUNTY; JOHN MEEHAN, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR ALAMEDA COUNTY; JAMES RIGGS, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR ALAMEDA COUNTY; WILLIAM D. CURTIS, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR MONTEREY COUNTY; ROSS UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR MONTEREY COUNTY; JAMES D. BOITANO, INDIVIDUALLY

AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR NAPA COUNTY; BARBARA GREENSLAKE, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR NAPA COUNTY; KEITH SORENSON, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN MATEO COUNTY; MARVIN CHURCH, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN MATEO COUNTY; ARTHUR DONNER, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CRUZ COUNTY; RICHARD (DICK) NEAL, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CRUZ COUNTY; GENE L. TUNNEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SONOMA COUNTY; EVE LEWIS, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR SONOMA COUNTY; LOUIS BERGNA, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; GEORGE A. MANN, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CLARA COUNTY; DAVID ILCHERT, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE IN THE SAN FRANCISCO BAY AREA, DEFENDANTS.

CIVIL RIGHTS
SECOND AMENDED COMPLAINT
CLASS ACTION THREE-JUDGE COURT

I

INTRODUCTION

1. By this action plaintiffs seek to enjoin federal and local public officials from engaging in discriminatory practices and policies aimed at preventing Hispanic-Americans and Chinese-Americans from participating in the electoral process. These illegal practices and policies have specifically focused on persons and groups who have requested and encouraged the use of bilingual election

materials provided under federal and state law. Despite defendants' knowledge that these practices and policies would violate plaintiffs' constitutional rights, defendants have steadfastly refused to halt a clandestine and discriminatory investigation of citizens of Hispanic and Chinese descent. Such practices, unless enjoined and declared illegal under the First, Fifth, Fourteenth and Fifteenth Amendments to the United States Constitution, the Voting Rights Acts of 1870, 1965 and 1975, as well as Article I, Section 1 of the California Constitution, will cause not only irreparable injury to these individuals but effectively deny their right to participate in the electoral process to vote.

II. JURISDICTION

2. Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1331 and § 1343 (1)(3)(4); the rights sought to be protected are guaranteed by the First Amendment, Fifteenth Amendment, the equal protection and due process clauses of the Fourteenth and Fifth Amendments, as well as Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000(d), and 42 U.S.C. §§ 1971, 1973 *et. seq.*, and 1983. Jurisdiction is also invoked pursuant to 42 U.S.C. § 1971(d) and § 1973.(f) which grant jurisdiction to district courts in actions seeking to enforce voting rights; 28 U.S.C. § 2284 and 42 U.S.C. § 1973c which provide for the convening of a three-judge court in actions under 42 U.S.C. § 1973c; 28 U.S.C. § 2201 which provides for actions for a declaratory judgment; and, 28 U.S.C. § 1361 since this is an action to compel an officer of the United States to perform a duty owed to plaintiffs. Plaintiffs also invoke the pendent jurisdiction of the court in connection with their claim that defendants' actions violate the right to informational privacy under the California Constitution, Article I, Section 1.

III. PARTIES

Plaintiffs

3. Plaintiff JOSE J. OLAGUES is a United States Citizen and a resident of Concord, California. He was born in Mexico and became a naturalized citizen of the United States in 1965. He is able to understand, read, write, and speak English and he is fully conversant and literate in his native tongue which is Spanish. Plaintiff Olagues has requested the use of bilingual voting election materials, and has participated in California's electoral process since 1966.

4. Plaintiff Hispanic Coalition for Human Rights is a broad based non-profit association of Hispanic organizations and persons of Mexican American descent residing in the San Francisco Bay Area. The Coalition's basic objective is to secure the civil rights of Hispanics, particularly with respect to voting and immigration matters. As such, its members are vitally interested and affected by the actions of defendants in investigating persons who have requested election materials in languages other than English. The Coalition represents such groups as the Mexican American Political Association, the National La Raza Lawyers Association, the League of United Latin American Citizens (LULAC), and other Hispanic groups, all of whom have members affected by the activities alleged herein. In attempting to encourage Americans of Hispanic descent to register and vote, the members of the coalition have aided and advised persons of the availability of bilingual election materials. The coalition members also, from time to time, utilize bilingual election materials.

5. Plaintiff Chinese For Affirmative Action is a San Francisco based non-profit, non-partisan, tax-exempt voluntary membership organization dedicated to protecting the rights of Chinese Americans and to promoting equal employment opportunities for members of the

Chinese community. Founded in 1969, Chinese for Affirmative Action has members who are non-English speaking citizens who utilize bilingual election materials and whose voting rights are protected by the 1975 amendment to the Voting Rights Act. Chinese for Affirmative Action has expended considerable time, funds and resources to monitor compliance by the San Francisco Registrar of Voters with respect to the bilingual election provision of the Voting Rights Act and to ensure that its members partake of election materials in a language other than English. Chinese for Affirmative Action members have been intimidated and discouraged from participating in the June 1982 primary and in turn have been dissuaded from encouraging prospective Asian-American voters from registering and voting. The actions by defendants directly undermine and prevent Chinese for Affirmative Action from carrying out its objectives.

6. Plaintiff San Francisco Latino Voter Registration Education Project (hereafter "Latino Voter Project") is a coalition of San Francisco Hispanic groups that is presently conducting a non-partisan registration drive aimed at registering as many Hispanics as possible before the June primary election and thereafter the national election in California. The Latino Project is vitally interested in having Hispanic citizens partake of the electoral process and exercise their legal right to register and vote. The Project, with its coalition members, is vitally interested in the activities herein alleged, and stands to be affected by the investigation and intimidation of persons who request bilingual ballots. The actions of defendants directly undermine and prevent the Latino Voter Registration Education Project from carrying out its objectives.

7. Plantiff Evelia Diaz-Infante is a United States citizen and a resident of Salinas, Monterey County, California. She was born in Mexico and became a naturalized citizen of the United States in 1978. She has

participated in the electoral process in California since becoming a naturalized citizen. Because she is more fluent in Spanish than in English, she had requested and used bilingual election material, and received the Spanish language packet in 1982. Plaintiff Diaz-Infante fears that she has been, or may be subjected to the investigation and verification procedures implemented in Monterey County against persons who request bilingual ballots, as complained of herein.

8. Plaintiff Juan D. Martinez is a United States citizen and a resident of Gonzalez, Monterey County, California. Since 1980, he has worked with a group of volunteers in orgainizing voter registration committees in Monterey County for the purpose of registering voters. These committees work primarily in Hispanic neighborhoods, and many of the prospective registrants prefer to use bilingual election materials in Spanish. A principal part of the work of plaintiff Martinez and of the voter registration committees is to educate people in these communities about the electoral process and the use of bilingual voting materials. The actions of defendants complained of herein have undermined and interfered with the efforts of plaintiff Martinez and the persons with whom he has associated to register voters and to encourage other people to volunteer to register voters.

DEFENDANTS

9. Defendant JOSEPH P. RUSSONIELLO is sued individually and in his official capacity as the United States Attorney for the Northern District of California.

10. Defendants JOHN MEEHAN, WILLIAM A. O'MALLEY, WILLIAM D. CURTIS, JAMES D. BOITANO, ARLO SMITH, KEITH SORENSON, ARTHUR DONNER, LOUIS BERGNA and GENE L. TUNNEY are all sued individually and in their official

capacities as District Attorneys for the Counties of Alameda, Contra Costa, Monterey, Napa, San Francisco, San Mateo, Santa Cruz, Santa Clara and Sonoma, respectively.

11. Defendants JAMES RIGGS, LON UNDERWOOD, ROSS UNDERWOOD BARBARA GREENSLATE, JAY PATTERSON, MARVIN CHURCH, RICHARD NEAL, GEORGE MANN and EVE LEWIS, are all sued individually and in their official capacities as Registrars of Voters for the Counties of Alameda, Contra Costa, Monterey, Napa, San Francisco, San Mateo, Santa Cruz, Santa Clara, and Sonoma, respectively.

12. Defendant DAVID ILCHERT is sued individually and in his official capacity as District Director for the Immigration and Naturalization Service for the San Francisco Bay area.

IV

CLASS ACTION ALLEGATIONS

13. Plaintiffs bring this action as a class action under Rule 23(b)(2). There are five classes.

a) As a first class, Plaintiff Jose J. Olagues and the class he represents are Hispanic American and Chinese American persons of foreign birth who have registered to vote or have voted within the last five years and have indicated a preference for utilizing election materials in a language other than English. Said class is limited to those individuals who reside in the following counties: Contra Costa, Alameda, San Francisco, Santa Cruz, Monterey, San Mateo, Napa, Sonoma and Santa Clara, and who, as a result of the actions taken by defendants, have been or will be subjected to governmental investigations and possible unwarranted criminal prosecutions by virtue of having their names culled from voter registration lists and sub-

mitted to governmental authorities because they have requested election materials in a language other than English.

b) As a second class, plaintiffs Jose J. Olagues, Hispanic Coalition for Human Rights, Chinese For Affirmative Action and San Francisco Latino Voter Registration Education Project represent those Hispanic-American and Chinese-American individuals who have voted or expressed a desire to vote in future elections and who, as a result of the actions taken by defendants, will either forego from expressing a desire to utilize election materials in a language other than English, or decline to participate in the electoral process.

c) As a third class, plaintiffs Hispanic Coalition for Human Rights, Chinese for Affirmative Action and San Francisco Latino Voter Registration Education Project represent those persons or groups acting individually or in concert with others who are involved in voter education projects with Americans of Hispanic or Chinese descent and by virtue of such activity inform individuals of the availability of bilingual election materials. Said class is composed of all such groups and individuals who will be subject to investigation by virtue or defendants activities.

d) As a fourth class, plaintiff Evilia Diaz-Infante and the class she represents are Hispanic American persons in Monterey County who have registered to vote or will seek to register to vote in the future, and have requested or will request to use bilingual election materials, and whose right to vote has been abridged and interfered with on the basis of their race and their language minority status by the actions and practices of defendants Curtis, Ross Underwood, Russoneillo and Ilchert.

e) As a fifth class, plaintiff Juan D. Martinez and the class he represents are those persons and groups, acting individually or in concert with others, who are involved in voter education and registration in Monterey County

directed towards Hispanic-Americans and who counsel and advise persons concerning the availability of bilingual ballot materials, and whose efforts are being deterred and interfered with by the actions of defendants Curtis, Ross Underwood, Russoniello and Ilchert.

14. The requirements of Rule 23 of the Federal Rules of Civil Procedure are met herein in that:

a) The classes sought to be certified are so numerous that joinder of all members is impracticable.

b) There are questions of law and fact common to members of both classes, and such questions clearly predominate over any questions affecting only individual members of both classes.

c) The claim of the representative plaintiffs are typical of the claims of each class.

d) The representative plaintiffs will fairly and adequately protect the interests of each class.

e) The parties opposing the classes have acted on grounds generally applicable to each class, thereby making appropriate final injunctive and declaratory relief with respect to each class as a whole.

V

FACTUAL ALLEGATIONS

15. On April 19, 1982 defendant Russoniello initiated a secret probe of Hispanic-American and Chinese-American voters by sending a letter to nine Bay Area District Attorneys (a copy of which is attached as Exhibit A). The probe sought to investigate citizens of Hispanic and Chinese descent who had falsely registered and which may affect, in defendant Russoniello words, "the June election such that the results would be subject to court challenge."

16. This investigation was allegedly precipitated by a February 1981 study conducted by defendants Santa Clara County District Attorney and County Registrar of Voters. This study allegedly disclosed that of a test sample of 100 newly registered persons of foreign birth in Santa Clara county, several individuals were determined not to be U.S. citizens. The study was not revealed to the public nor was it made available to defendant district attorneys or registrars in initiating the investigation.

17. The April 19, 1982 letter requested each District Attorney and Registrar of Voters in the counties of Alameda, Contra Costa, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz and Sonoma to compile a list of Hispanic-American and Chinese-American persons within those counties whose recent affidavits of registration reflect (1) a foreign country as the place of birth, and (2) a preference for election materials in a language other than English.

18. The defendant District Attorneys were then to forward twenty-five "selected" names to defendant Russoniello for transmittal to defendant Ilchert. After a scan by the United States Immigration and Naturalization Service to determine whether such Hispanic-Americans and Chinese-Americans were eligible to vote, persons for whom there exists some doubt as to their voter eligibility would be referred back to defendant District Attorneys for investigation.

19. The actions of defendants to date have followed the procedures and time table stated in defendant Russoniello's letter. Accordingly, names of individuals who have requested bilingual ballots have been transmitted by defendant District Attorneys and defendant Registrars of Voters to defendant Russoniello. These names of persons have been reviewed by defendant Ilchert and the Immigration and Naturalization Service, and these

Hispanic-Americans and Chinese-Americans have been, or will be, subject to investigation by defendant District Attorneys.

20. Despite the questionable validity of a fourteen month old study involving a test sample of only 100 newly registered persons of foreign birth, Defendant Russoniello has insisted on maintaining this investigation only against persons requesting election information in Spanish or Chinese.

21. Such an investigation of persons who were foreign born and may have been ineligible to vote was not based on any reasonable suspicion that foreign born voters were committing fraud nor that the problem of voter irregularities was limited only to persons of Hispanic-American or Chinese-American descent. By focusing the investigation only on this select group of individuals, limited by national origin and race to Hispanic-Americans and Chinese-Americans, defendants have acted willfully with a malicious intent to violate the legal rights of plaintiffs, and have arbitrarily discriminated against those individuals who had requested bilingual election materials, i.e., citizens of Hispanic and Chinese descent.

22. Plaintiffs have suffered, and will suffer, irreparable injury because of the threat that they and their association with political groups may be investigated if federal defendants are "unable to state with surety" (see Exhibit A) that the former are naturalized citizens eligible to vote.

23. Defendants, all of whom are versed in the First Amendment rights of individuals to associate with groups and entities, as well as the right of individuals to participate in the electoral process free from racial or national origin stigmas, knew or should have known that such actions would single out only citizens of Hispanic or Chinese descent. Despite such knowledge, defendants pursued such an investigation in reckless disregard of the rights of such individuals.

24. As a result of these clandestine investigations, defendants also planned to question citizens of Hispanic and Chinese descent who had their names pulled from voter registration lists as to which "special interest" groups had registered them, why they had registered, and whether such individuals had been induced to register under false pretenses. Such an investigation, as defendants knew, would not only violate the individuals' right of association and right to refuse to answer questions as to political activity, but also effectively intimidate, threaten and coerce Hispanic and Chinese-American groups actively involved in encouraging individuals to participate in registering and voting.

25. The activities undertaken by defendants were not undertaken pursuant to any grand jury investigation, nor was there any authorization given to those officials to undertake such an investigation by California State officials or the United States Attorney General. Such actions by defendants were undertaken outside the scope of their authority and were an abuse of discretion.

26. Each of the defendants herein have participated in, or are beneficiaries of, programs that receive federal financial assistance.

VI

REQUISITES FOR RELIEF

27. Plaintiffs have suffered, and will continue to suffer, irreparable harm, injury, and loss as a direct and proximate result of the conduct of defendants complained of herein.

28. Plaintiffs lack a plain, speedy, or adequate remedy at law to prevent such irreparable harm, injury and loss, and will continue to so suffer unless this Court enjoins the conduct complained of.

29. An actual and substantial controversy exists between plaintiffs and defendants:

a. Plaintiffs contend that the conduct of defendants complained of herein is unlawful and unconstitutional for the reasons set forth herein.

b. Defendants contend that their conduct as described above is lawful and constitutional in all respects and fully intend to continue such conduct.

30. By reason of the acts of defendants complained of herein, plaintiffs have suffered actual harm and damage.

31. Defendants have committed the acts complained of herein willfully, maliciously, and in bad faith, under color of authority of the United States and the State of California, with full knowledge that said acts were violative of the constitutional and statutory rights alleged herein.

VII

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Violation of Fifteenth Amendment)

32. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 31, as set forth above.

33. By reason of the actions of the defendants as set forth herein above, Defendants have violated the Fifteenth Amendment.

SECOND CLAIM FOR RELEIF

(Equal Protection)

34. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 31, as set forth above.

35. Defendants have participated in the compilation of a list of individuals on voter registration lists who have or will have used bilingual election materials. Such a list was compiled only of citizens of Hispanic or Chinese descent, since by necessity only these individuals request bilingual election materials. Despite defendants' knowledge that voting irregularities may have occurred with respect to all naturalized citizens, defendants intentionally selected only citizens of Hispanic or Chinese descent for investigation.

36. This classification of voters is invidious and arbitrary in that it causes a discriminatory investigation of plaintiffs and the class they represent solely on the basis of race, color or national origin. As to the Federal defendants, such discriminatory practices deny plaintiffs equal protection of the law in violation of the Fifth Amendment to the United States Constitution. As to the State defendants, such practicies violate the Fourteenth Amendment.

THIRD CLAIM FOR RELIEF

(Due Process)

37. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 31, as set forth above.

38. The investigation herein described was undertaken by defendants without any reasonable basis to believe that citizens of foreign birth requesting bilingual ballot material were illegally registering to vote. Such investigation, undertaken in a clandestine manner, is in violation of plaintiffs' due process rights under the Fifth and Fourteenth Amendment to the United States Constitution as against the state defendants and the Fifth Amendment against the federal defendants.

FOURTH CLAIM FOR RELIEF

(Violation of Civil Rights Act, 42 U.S.C. § 1971 *et seq.*)

39. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 31, as set forth above.

40. The actions of all defendants as set out above have effectively intimidated, threatened, and coerced citizens of Hispanic and Chinese ancestry from participating in the electoral process. Such actions, made under color of state or federal law, have been undertaken on the basis of race, color and national origin in violation of the Civil Rights Act of 1960, 42 U.S.C. §1971, *et seq.*, and particularly 42 U.S.C. §§ 1971(a)(2)(A) and 1971(b).

FIFTH CLAIM FOR RELIEF

(Violation of Voting Rights Act, 42 U.S.C. § 1973 *et. seq.*)

41. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 31, as set forth above.

42. The actions of all defendants as set out above have effectively intimidated, threatened, and coerced plaintiffs by establishing qualifications to vote based on race and national origin as well as intimidating, threatening and preventing plaintiffs from aiding citizens of Hispanic and Chinese ancestry from participating in the electoral process in violation of 42 U.S.C. § 1973 *et seq.*, and particularly 42 U.S.C. §§ 1973, 1973b (f)(2) 1973i(b), 1973j(a) and 1973j(c).

SIXTH CLAIM FOR RELIEF

(Violation of Bilingual Election Requirements, 42 U.S.C. 1973 aa-1a)

43. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 31, as set forth above.

44. The actions of the defendants as set out above have effectively discriminated against citizens of language minorities, in violation of 42 U.S.C. § 1973 aa-1a, *et seq.*, which prohibits such practices.

SEVENTH CLAIM FOR RELIEF

(Violation of First Amendment)

45. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 31, as set forth above.

46. The actions of defendants as set out above have effectively threatened, coerced and intimidated plaintiffs in their efforts to seek out citizens of Hispanic and Chinese ancestry for purposes of urging them to participate in the electoral process. Defendants' actions, which threaten to investigate how plaintiff groups are registering citizens of Hispanic and Chinese descent, are and will be violating plaintiffs' right of association and political expression in violation of the First Amendment to the United States Constitution.

EIGHTH CLAIM FOR RELIEF

(42 U.S.C. 2000(d)

47. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 31, as set forth above.

48. The actions of defendants have subjected plaintiffs to discrimination on the basis of race, color or national origin under a program or activity receiving federal financial assistance in violation of 42 U.S.C. § 2000(d).

NINTH CLAIM FOR RELIEF

(Right of Privacy)

49. Plaintiffs hereby refer to and incorporate each and

every allegation in Paragraphs 1 through 31, as set forth above.

50. By defendants selecting names of individuals seeking election material in languages other than English for the purpose of secret investigations, defendants have initiated, encouraged and condoned a violation of Article I, Section 1 of the California Constitution which guarantees a right of privacy to every person in California. Such acts by defendants violated plaintiffs' right of privacy in that using a person's request for a bilingual ballot was for an entirely unauthorized, unrelated purpose.

TENTH CLAIM FOR RELIEF

(Violation of Section 5 of Voting Rights Act)

51. Plaintiffs hereby refer to and incorporate each and every allegation in Paragraphs 1 through 31, as set forth above.

52. Under the provisions of Sections 4 and 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973b and § 1973c), Monterey County is a covered jurisdiction which is required by law before enacting or seeking to administer any changes in voting qualifications or prerequisites to voting, or changes in any standard, practices or procedure with respect to voting, to seek approval and clearance for any such change from the United States District Court for the District of Columbia or from the Attoreny General of the United States.

53. Commencing on or about April 19, 1982, defendants Curtis and Ross Underwood, together with defendants Russoniello and Ilchert, as complained of herein, have enacted and seek to administer a change in voting qualifications and prerequisites to voting, and the standards, practices and procedures with respect to voting in Monterey County, by selecting out registrants solely on the basis of their foreign birth and request for a bilingual

ballot, submitting the names of these registrants to federal agencies, including the United States Attorney and the Immigration and Naturalization Service, for a verification of their citizenship status and eligiblity to vote, and then having officials of Monterey County contact and investigate certain of the registrants as to their citizenship status, the circumstances of their registration, and identity of any person or organization who assisted them in registering and requesting bilingual ballots.

54. Monterey County has not submitted and precleared the practices and procedures described in paragraph 53 above to the Attorney General of the United States for approval nor has the County sought or obtained a declaratory judgment from the United States District Court for the District of Columbia that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote in violation of the Voting Rights Act.

55. The actions of defendants Curtis, Ross Underwood, Russoniello and Ilchert in singling out the investigating persons based on their race and language minority status has discriminated against said persons and interfered and deterred them from utilizing bilingual election materials and participating in the electorial process, and has also interfered and deterred persons and groups from associating together to counsel and advise individuals of Hispanic descent to utilize bilingual election materials and participate in the electorial process.

56. The actions of defendants Curtis, Ross Underwood, Russoniello and Ilchert in following the procedures and practices described above without first obtaining federal preclearance violate Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray:

1. For a temporary restraining order prohibiting defendant Russoniello, his successors, employees, agents, and all persons working in concert or participation with him, from requesting, seeking, soliciting, or requiring that defendant District Attorneys and Registrars forward to the office of the United States Attorney the names of any persons solely on the basis of their having sought bilingual election materials in their respective counties, and further requiring defendants Russoniello and Ilchert, their successors, employees, agents, and defendant District Attorneys and Registrars, and all persons working in concert or participation with them, to maintain, under seal pending further order of the Court, all information previously gathered solely on the basis of a person having requested bilingual ballot material and to refrain from transferring said information to any other person or agency, and further prohibiting the defendant District Attorneys and County Registrars, their successors, employees, agents, and all persons working in concert or participation with them, from taking any further action to facilitate, aid, or otherwise assist the office of the United States Attorney or the Immigration and Naturalization Service to obtain names of persons requesting bilingual ballot materials, and to show cause before the court why they should not be enjoined in the future.

2. For an order certifying that plaintiffs may properly represent all other persons similarly situated and that the action may be maintained as a class action.

3. For a preliminary injunction prohibiting defendant Russoniello, his successors, employees, agents, and all other persons working in concert or participation with him from requesting, seeking, soliciting or requiring that defendant District Attorneys and Registrars forward to the office of the United States Attorney or the Immigra-

tion and Naturalization Service the names of any persons solely on the basis of their having sought bilingual election materials in their respective counties, and further requiring that defendants Russoniello and Ilchert, and defendants District Attorneys and Registrars, maintain under seal pending final disposition of the case, all information previously gathered and refrain from transferring the information by any person or agency except under court order, and further prohibiting defendant District Attorneys and Registrars, their successors, employees, agents and all persons working in concert or participation with them from taking any further actions to facilitate, aid, or otherwise assist the office of the United States Attorney or the Immigration and Naturalization Service to obtain names or intimidate persons requesting bilingual ballot materials.

4. For a preliminary injunction restraining the defendants and each of them, their successors, employees, and all persons working in concert or participation with them, from taking any action to threaten, intimidate, or coerce any persons or group from exercising their right or attempting to exercise their right to receive bilingual election materials under state or federal law.

5. For a judgment pursuant to 28 U.S.C. § 2201-2202 declaring the respective rights of the parties.

6. For a permanent injunction prohibiting defendant Russoniello, his successors, employees agents, all other persons working in concert or participation with him, from requesting, seeking, soliciting or requiring that defendant District Attorneys and Registrars forward to the office of the United States Attorney or the Immigration and Naturalization Service the names of any persons solely on the basis of their having sought bilingual election materials in their respective counties, and further requiring that defendants Russoniello and Ilchert, and defendants District Attorneys and Registrars, destroy, expunge

and obliterate all information previously gathered, and refrain from transferring the information to any person or agency except under court order, and further prohibiting defendant District Attorneys and Registrars, their successors, employees, agents and all persons working in concert or participation with them from taking any further actions to facilitate, aid, or otherwise assist the office of the United States Attorney or the Immigration and Naturalization Service to obtain names or intimidate persons requesting bilingual ballot materials.

7. For the convening of a three-judge court to determine plaintiffs' Tenth Claim For Relief.

8. Pursuant to the Tenth Claim for Relief, for a temporary restraining order, and, after hearing, a preliminary injunction prohibiting defendants Curtis, Ross Underwood, Russoniello and Ilchert, their successors, employees, agents, and all persons working in concert of participation with them, prior to Monterey County having complied with the requirements of 42 U.S.C. § 1973c with respect to obtaining preclearance for the investigation and procedures complained of herein, from participating or administering in any way the investigation of bilingual voters instituted by defendant Russoniello, including, but not limited to, contacting or investigating individuals or groups who have been singled out pursuant to the procedures complained of in this complaint, forwarding any information or names obtained as a result of the investigation complained of herein to any other person or agency, and also ordering said defendants to maintain under seal pending further order of the Court all information previously gathered as a result of the investigation complained of herein; and for a permanent injunction making said preliminary injunction permanent.

9. For damages according to law and proof.

10. For costs of suit and reasonable attorneys fees.

11. For all other relief that the court finds equitable and proper.

DATED: July 28, 1982

Respectfully submitted,

JOAQUIN G. AVILA
MORRIS J. BALLER
HECTOR VASQUEZ
SUSAN E. BROWN
RONALD T. VERA
Mexican American Legal Defense and Educational Fund

MARGARET C. CROSBY
ALAN L. SCHLOSSER
AMITAI SCHWARTZ
American Civil Liberties Union Foundation of Northern California

LAWRENCE B. GARCIA
KATHLEEN POOL

By: ALAN L. SCHLOSSER
Alan L. Schlosser
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; ET AL., DEFENDANTS.

DECLARATION OF LON UNDERWOOD

I, Lon Underwood, say:

1. I am the Assistant County Registrar and Supervisor of the Elections Department of Contra Costa County.

2. On April 21, 1982, the District Attorney of Contra Costa County requested that my Department submit names and dates of birth of 25 newly registered persons whose registration affidavits showed a foreign country as a place of birth and a request for bilingual election materials. To insure proper distribution of bilingual materials to our County's voters, the Elections Department has programmed its computers to provide a separate listing of those requesting bilingual ballot materials. Therefore, I was able to provide the District Attorney with the information he requested on April 22, 1982. It was not necessary for us to consider the race or surname of voters in compiling this information. I have not received any additional requests for bilingual ballot information from the District Attorney since April 22.

3. On May 10, 1982, the Hispanic Coalition for Human Rights requested copies of the information we provided to the District Attorney and we complied with this request. (See Exhibit A attached hereto and incorporated herein by this reference.) It is our practice to allow public inspection of voter registration information provided such inspection is for an electoral or governmental purpose as required by Elections Code §§ 600 and 607 and 2 California Administrative Code § 19001 et seq. A copy of 2 California Administrative Code § 19001 et seq. is marked Exhibit B, attached hereto and incorporated by this reference.

I declare under penalty of perjury that the foregoing is true of my own personal knowledge and if called upon to do so, I could and would testify as set forth herein.

Executed on September 21, 1982 at Martinez, California.

/s/ LON UNDERWOOD
Lon Underwood

PJL/jh

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil # C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL., PLAINTIFF,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS.

DECLARATION OF JAMES D. BOITANO, DISTRICT ATTORNEY FOR THE COUNTY OF NAPA

COMES NOW JAMES D. BOITANO and declares as follows:

1. My name is JAMES D. BOITANO. I am now, and have since January 6, 1962, been District Attorney for the County of Napa.

2. I make this declaration on the basis of personal knowledge.

3. On or about April 20, 1982, I received a letter from Joseph P. Russoniello, United States Attorney for the Northern District of California. Therein, Russoniello reported that a recent investigation in Santa Clara County disclosed that at least some foreign born people who had registered to vote there were not United States citizens. Therefore, he asked me to provide him with the randomly selected names of newly registered persons of foreign birth who had requested ballot materials in languages other than English. According to his letter, Russoniello requested the information to determine how widespread the registration of persons ineligible to vote might be.

4. In my opinion, the request made by Russoniello was a lawful one which neither impinged upon nor violated the rights of any person.

5. Furthermore, in my opinion, the request made by Russoniello, and complied with by me, was not an unreasonable one under the circumstances, for it made effective and appropriate use of the investigative abilities of a "brother" law enforcement agency.

6. Finally, I have not conducted, and have no present intention of conducting, a further investigation regarding the registration of persons ineligible to vote.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of September, 1982, in Napa, California.

/s/ JAMES D. BOITANO
By: William G. Gusse
Chief Deputy District Attorney
Napa County

JCF/lea
9/22/82

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil # C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL., PLAINTIFF,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS.

DECLARATION OF BARBARA GREENSLATE, ELECTIONS SUPERVISOR FOR THE COUNTY OF NAPA

Comes now Barbara Greenslate and declares as follows:

1. My name is Barbara Greenslate. I am now, and have since July 1, 1975, been Elections Supervisor for the County of Napa.

2. I make this declaration on the basis of personal knowledge.

3. On or about April 21, 1982, I received a letter from James D. Boitano, District Attorney for the County of Napa. Attached thereto was a copy of a letter written to Mr. Boitano by Joseph P. Russoniello, United States Attorney for the Northern District of California. In his letter, Mr. Russoniello reported that a recent investigation in Santa Clara County disclosed that at least some foreign born people who had registered to vote there were not United States citizens. Therefore, he asked for the randomly selected names of 23 newly registered persons of foreign birth who had requested ballot materials in languages other than English. According to his letter, Mr. Russoniello was requesting the information in order to

determine how widespread the registration of persons ineligible to vote might be. At his request, I gave Mr. Boitano the names of 23 newly registered persons of foreign birth who had requested ballot materials in languages other than English.

4. The information which I gave James D. Boitano is a public record; that is, information which I am compelled by the laws of the State of California to disclose upon request.

5. Furthermore, in my opinion, the disclosure to Mr. Boitano of the information described above was lawful, for it neither impinged upon nor violated the rights of any person.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22nd day of September, 1982, in Napa, California.

/s/ BARBARA GREENSLATE
Barbara Greenslate

JCP/lea
9/22/82

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

DECLARATION OF MARVIN CHURCH

I, MARVIN CHURCH, declare that:

1. I am the County Clerk and Registrar of Voters for the County of San Mateo, State of California.

2. I am personally knowledgeable of the matters stated hereinafter except as to those matters with respect to which I am informed and believe them to be true, which information and belief are asserted hereafter as to such matters, as appropriate.

3. On April 21, 1982, I received a memorandum from Keith C. Sorenson, San Mateo County District Attorney, accompanied by a letter to Mr. Sorenson from Joseph P. Russoniello, United States Attorney for the Northern District of California. In his letter Mr. Russoniello requested a random sample of 25 names from the list of registered voters in San Mateo County. He asked that the names be selected from those voters who had indicated on their affidavits of registration that they were foreign born and who had also requested voter material in the Spanish language. Mr. Sorenson's memorandum asked me to provide the random sample requested by Mr. Russoniello.

4. Pursuant to the District Attorney's request, I directed my Chief Deputy to select at random from the current list of registered voters the names of 25 persons

whose registrations showed them to be foreign born and who had requested voter material in the Spanish language.

5. Pursuant to my request, the random sample was prepared; and on April 28, 1982, I forwarded the sample list of 25 names to Mr. Russoniello.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Redwood City, California, on September 17, 1982.

/s/ MARVIN CHURCH

Marvin Church, *County Clerk and Registrar of Voters, San Mateo County*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL., PLAINTIFF,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS.

DECLARATION OF RAY E. CUNNINGHAM

I, RAY E. CUNNINGHAM, declare that:

1. I am a Deputy District Attorney for the County of Santa Clara.

2. I am personally knowledgeable of those matters stated hereafter, except as to those matters with respect to which I am informed and believe them to be true, which information and belief is asserted hereafter as to such matters, where appropriate.

3. I have been a member of the Santa Clara County District Attorney's Office for seven (7) years.

4. I was the Deputy District Attorney in charge of the local Santa Clara County investigation into allegations of possible voter registration fraud in Santa Clara County.

5. The Santa Clara County investigation was conducted between February, 1981, and February, 1982, and Louis Bergna, District Attorney for Santa Clara County, was informed of the progress and conclusion of the investigation.

6. Our investigation demonstrated that a number of illegally registered foreign born voters who we interviewed

had registered due to a language problem vis-a-vis the person conducting the registration drive.

7. Some months after the conclusion of our investigation, this office was contacted by the United States Attorney's Office concerning our investigation of possible voter registration fraud.

8. Our office welcomed the federal government's interest in pursuing an investigation into the area of possible voter registration fraud.

9. In responding to United States Attorney Russoniello's April 19, 1982, request, we were cooperating in good faith with a federal investigation in an area that this office believed needed to be addressed at the federal and/or state level.

10. United States Attorney Russoniello's investigation into foreign born voters who requested a bilingual ballot addressed a problem identified in our earlier investigation.

11. It is this office's belief that the United States Attorney's requested information did not violate any individual's legal rights.

12. The Santa Clara County District Attorney Office's cooperation with the United States Attorney did not violate any individual's legal rights.

Dated: September 20, 1982.

/s/ RAY E. CUNNINGHAM
Ray E. Cunningham

SGL:lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; ET AL., DEFENDANTS.

DECLARATION OF WILLIAM D. CURTIS

I, WILLIAM D. CURTIS, declare that:

1. I am the District Attorney for the County of Monterey, State of California.

2. I am personally knowledgeable of the matters stated hereafter, except as to those matters with respect to which I am informed and believe them to be true, which information and belief is asserted hereafter as to such matters, where appropriate.

3. On April 20, 1982, I received a letter dated April 19, 1982, from Joseph P. Russoniello, United States Attorney, Northern District of California. A true and correct copy of the letter is attached hereto, marked Exhibit A, and is incorporated herein by reference as though set forth in full.

4. The letter requested that I obtain from the Monterey County Registrar of Voters the names and dates of birth of twenty-five (25) persons of new registration, randomly selected, whose affidavits of registration reflected: (1) place of birth in a foreign country; and (2) a preference for election materials in a language other than

English, and that I forward those names and dates of birth to the United States Attorney not later than April 30, 1982.

5. The letter stated that Mr. Russoniello did not contemplate pursuing criminal prosecutions against ineligible persons who had registered to vote, but that he would seriously consider prosecuting persons whom the evidence showed deliberately conspired with another for the purpose of encouraging the giving of false information in order to establish the eligibility of any individual to register to vote.

6. The letter also stated that I would be free to take whatever action I deemed appropriate, pursuant to California Elections Code Section 29200, which provides as follows:

> "(a) Every person who willfully causes, procures, or allows himself or any other person to be registered as a voter, knowing that he or that other person is not entitled to registration, is punishable by imprisonment in the state prison for 16 months or two or three years, or in a county jail for not more than one year.
>
> "(b) Every person who knowingly and willfully signs, or causes or procures the signing of an affidavit of, registration of a nonexistent person, and who mails or delivers, or causes or procures the mailing or delivery of, such affidavit to a county clerk is guilty of a crime punishable by imprisonment in the state prison for 16 months or two or three years, or in a county jail for not more than one year. For purposes of this subdivision, "nonexistent person" includes, but is not limited to, deceased persons, animals, and inanimate objects."

7. Mr. Russoniello's letter requested that interviews be conducted with respect to those Monterey County residents in the random sampling as to whom the United States Attorney could not state with certainty that he/she had been naturalized. The purpose of such interviews was

to determine: (1) the basis upon which the person claimed citizenship and entitlement to vote; and (2) where the person did not claim citizenship, what representations were made to that person as to the necessary qualifications to vote at the time the person was registered. It was requested that all such interviews be completed by me by May 21, 1982.

8. On April 21, 1982, at my direction, John M. Phillips, Assistant District Attorney, called Ross Underwood, Monterey County Registrar of Voters, explained the nature and purpose of his request for the random sampling of twenty-five (25) newly registered persons of foreign birth who had requested election materials in a language other than English, then sent Mr. Underwood a confirming memorandum, also dated April 21, 1982. The memorandum, a true and correct copy of which is attached hereto, marked Exhibit B, and is incorporated herein by reference, as though set forth in full, repeated Mr. Phillips' telephone request that the matter be kept strictly confidential. This was in keeping with the apparent intent of Mr. Russoniello's letter (eg., page 2, paragraph 1 and page 3, paragraph 4), and my understanding that this was in fact a preliminary investigation by the United States Attorney in which we had been asked to render assistance.

9. On April 30, 1982, Betty L. Bloomer, Monterey County Assistant Registrar of Voters, forwarded certified copies of the requested random sampling of newly registered voters, together with a cover memorandum, a true and correct copy of which is attached hereto, marked Exhibit C, and is incorporated herein by reference as though set forth in full. I was informed by Mr. Phillips just after that date that they had been received.

10. On May 4, 1982, at my request, Thomas A. Kenan, my Administrative Assistant, sent a letter to Joseph P. Russoniello, transmitting the 25 randomly selected certified copies of voter registration affidavits

which we had been requested by the United States Attorney to obtain from the Monterey County Registrar of Voters. A true and correct copy of that letter is attached hereto, marked C, and is incorporated herein by reference as though set forth in full.

11. On May 27, 1982, I received a letter dated May 26, 1982, from Joseph P. Russoniello, a true and correct copy of which is attached hereto, marked Exhibit D, and is incorporated herein by reference as though set forth in full. The letter contained general information concerning the statistical data developed from the respective submissions of the various counties from whom random samplings had been obtained, and requested that follow-up interviews be conducted with persons for whom no federal record confirming citizenship status of the individual was found, or for whom the record found did not indicate naturalization status. (See, also Exhibit A, bottom of page 2, top of page 3.) Inter alia, a suggested Interview Sheet form was attached to the letter, indicating the information desired by the United States Attorney to be obtained in the follow-up interviews. A true and correct copy of that Interview Sheet form is attached hereto, marked Exhibit E, and is incorporated herein by reference as though set forth in full. From the statement contained at the top of page 3 of Exhibit D, it was my belief that we were merely assisting the United States Attorney to get the remaining local information needed for the investigation he was conducting, and that if we were unable to conduct the requested interviews, the United States Attorney would make ". . . other arrangements . . . to get this done."

12. In conversations with Assistant District Attorney John M. Phillips after the receipt of Mr. Russoniello's May 26, 1982 letter, it was our decision to shorten the Interview Sheet form by deleting subsections c), d) and e) from the last question on the form, for the reason that the preceding questions sufficiently developed the informa-

tion apparently sought by the United States Attorney that subsections c), d) and e) added little to the information which would already have been given in answering the preceding questions. In addition, I considered the remote possibility that those subsections might conceivably give rise to unwarranted or added controversy in the lawsuit already filed. Viewed in light of those considerations, I felt that those three subsections could safely be deleted without altering the character, nature or extent of the United States Attorney's investigation. A true and correct copy of the shortened Interviewed Sheet form is attached hereto, marked Exhibit F, and is incorporated herein by reference as though set forth in full.

13. After receipt of Mr. Russoniello's May 26, 1982 letter, I instructed John M. Phillips to delay assigning the interviews requested by the United States Attorney to one of our investigators until after the June, 1982 primary elections, so that our assistance to the United States Attorney would not in any way affect the voting process or the registration of voters for the June, 1982 primary elections. Additionally, I asked Mr. Phillips to telephone William McGivern, Assistant United States Attorney, to inform him that it would take some time to conduct the interviews requested, since our office had more pressing investigations pending.

14. In approximately mid-June, at my direction, Mr. Phillips assigned the task of completing the requested interviews to R. Lucille Withers, one of our District Attorney Investigators, inasmuch as she is bilingually fluent in Spanish. Thirteen of these interviews were conducted by her between the dates of June 29 and July 13, 1982.

15. The completed Information Sheets resulting from those interviews conducted by R. Lucille Withers were forwarded to me shortly after July 13, 1982, and are still in my possession. Neither the completed Information Sheets

not the information contained thereon has been transmitted to the United States Attorney or anyone else. On the advice of counsel, it is my intention to take no further action in this matter, by which I mean: (1) I do not intend to forward the information obtained in the interviews conducted by R. Lucille Withers to the United States Attorney without an order of a court of competent jurisdiction requiring that I do so; and (2) I do not intend to contact any of the persons for whom interviews were requested by the United States Attorney.

16. Throughout this matter, it has been my understanding and belief: (1) that I was merely assisting the United States Attorney to conduct an investigation concerning irregularities with respect to voter registration; (2) that the United States Attorney could himself have done the things I was requested to do, particularly because of the fact that the Affidavit of Voter Registration is a public record pursuant to California Government Code Sections 6250, et seq., available to any person for inspection upon his/her request; and (3) that the United States Attorney's office was not seeking the information requested of me in order to criminally prosecute those persons who had been improperly registered.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 20th, 1982.

/s/ WILLIAM D. CURTIS

William D. Curtis
Monterey County District Attorney

Exhibit A

U.S. Department of Justice

United States Attorney
Northern District of California

16th Floor Federal Building – Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

Branch Office
675 N. First Street, Suite 508
San Jose, California 95112

April 19, 1982

Honorable William D. Curtis
District Attorney
Monterey County
240 Church Street
Post Office Box 1369
Salinas, California 93902

Re: Primary Election: June 8, 1982 –
Possible Inappropriate Voter Registration
of Aliens

Dear Mr. Curtis:

Your county, together with the counties of Alameda, Contra Costa, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz and Sonoma, has previously been identified as effected by the provisions of 42 United States Code, Section 1973aa-1a and following, commonly known as the Bilingual Election Requirement. Those provisions require that each effected country provide "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral

process, including ballots," in the Spanish language and, in the case of San Francisco County, in the Chinese language in addition to English.

As a corollary to the effected counties' efforts to comply, several groups have undertaken voter registration drives targeted toward registering individuals whose primary language is Spanish or Chinese and we do not challenge their rights to do so. However, an investigation undertaken by the Santa Clara County District Attorney at the request of Voter Registrar George Mann beginning in about February 1981, disclosed that with respect to a test sample of 100 newly-registered persons of foreign birth, twenty were determined not to be U.S. Citizens and eleven others could not be located. The investigation disclosed that those persons who were not U.S. Citizens, but who did register erroneously, believed they were eligible to vote because they were either married to U.S. Citizens or had been residents of the United States for a long period of time.

We are concerned, as I am sure you are, that if as many as thirty percent of the newly-registered foreign born persons vote even though they are not eligible to do so, especially given the expected intensive effort to register non-English speaking persons, the elections to be held June 8 may be so effected that the results are subject to court challenge. Any successful challenge will mean considerable expense, both to the counties and to the candidates involved therein.

It is too early to sound any alarm but there is, in my judgment, a sufficient basis for our undertaking some mutual effort to determine the extent to which persons are being registered who are not entitled to vote. If such be the case it seems to me that the fault or blame, if any need be leveled, lies with the registration affidavit form itself in

that even though question No. 6 asks for the state in the USA or foreign country of birth, there is no follow-up question eliciting information as to the date and place of naturalization if a foreign country *is* the place of birth. Even though the affidavit contains the statement, "I am a citizen of the United States . . . ," as has previously been shown, a significant number of persons believed that citizenship was synonomous with residency and/or could be acquired by marriage alone. (I enclose a copy of the affidavit which I understand is used in one form or another in your county for your information.)

Before any accurate assessment can be made that we have a problem with respect to the June election, we should at least sample the newly-registered persons of foreign birth to determine what percentage of them are in fact eligible to vote and to that end I propose the following:

1. Through your good offices, the Registrar of Voters should be asked to submit at random the names and dates of birth of twenty-five persons of new registration, whose affidavits of registration reflect (1) a foreign country as the place of birth and (2) a preference for election materials in a language other than English.

2. Those names and dates of birth should be forwarded to us not later than April 30, 1982.

3. Upon receipt, we will forward the twenty-five names received from your Registrar and the twenty-five names received from the Registrars in all other counties aforenamed to the Immigration and Naturalization Service who will scan their computer for the purpose of determining the number of persons known to be naturalized or, in the alternative, known to be resident aliens ineligible to vote. They will report their results to us and we will pass them on to you by no later than May 7, 1982.

4. As to each person with respect to whom we are unable to state with surety that he/she has ben naturalized, a follow-up interview should be conducted by your

office to determine (1) the basis upon which they claim citizenship and entitlement to vote and (2) in cases in which they are unable to prove citizenship, what representations were made to them by Registrars as to their qualification to vote. These follow-up interviews should be given priority so that all investigations are completed by May 21.

5. On May 24 we will check with each DA's office to determine the results of their investigation and will report to each office on May 25 the results of the overall investigation.

6. Depending upon those results and the extent to which inappropriate rgistration is determined, we should decide by mutual agreement what further action to take. In this connection, a joint press conference alerting the general public and prospective unauthorized voters in particular of the results of our investigation might be appropriate. Alternatively, the respective Registrars may choose to take some action with regard to each potential voter effected by our survey to require proof of citizenship before permitting that person to vote. The various alternatives will require considerable discussion and your input as well as the input of the Registrars of Voters who might be required to take some action.

For our part, we do not comtemplate initiating prosecutions against individual registrants as we are empowered to do pursuant to the provisions of 42 U.S.C. Section 1973dd-3(c), but will seriously consider such prosecutions against persons whom the evidence shows deliberately "conspired with another individual for the purpose of encouraging the giving of false information in order to establish the eligibility of any individual to register . . ." You would of course be free to pursue whatever action you deemed appropriate as provided for in Section 29200 of the California Elections Code.

Because of the sensitivity of this matter and because it is premature to suggest that the June 8 election is in jeopardy, we will refrain from issuing any press advisory or making any statement regarding this ongoing investigation and will consult with you before taking any such action. I would appreciate your doing likewise and hearing from you if you consider some media notification to be appropriate at this time.

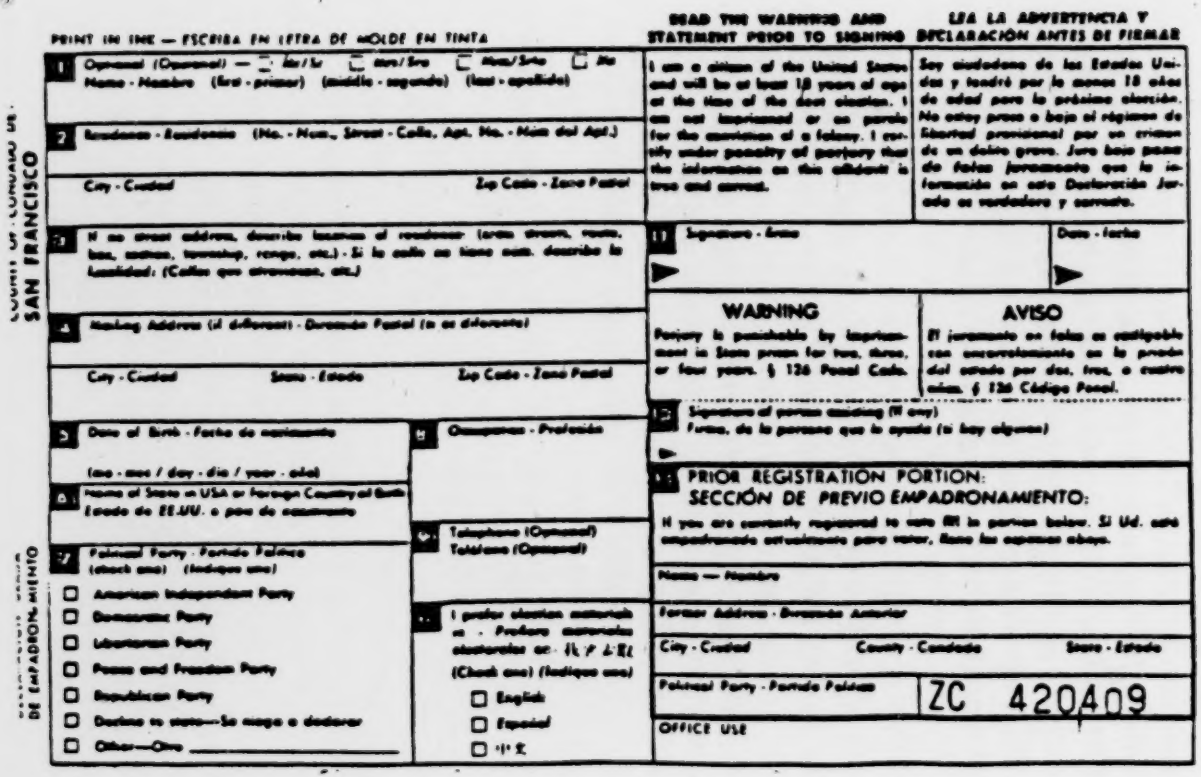
If you have any question concerning the foregoing or would like to discuss the matter further, Chief Assistant United States Attorney William T. McGivern (556-8477) will be coordinating the effort on our end and will make himself available to discuss planning with you.

Very truly yours,

/s/ JOSEPH P. RUSSONIELLO

Jospeh P. Russoniello
United States Attorney

Enclosure



PRINT IN INK — ESCRIBA EN LETRA DE MOLDE EN TINTA

COUNTY OF CONTRA COSTA
SAN FRANCISCO

DECLARACION DE EMPADRONAMIENTO

1 Optional (Opcional) — ☐ Mr./Sr. ☐ Mrs./Sra. ☐ Miss/Srta. ☐ Ms.
Name - Nombre (first - primer) (middle - segundo) (last - apellido)

2 Residence - Residencia (No. - Num., Street - Calle, Apt. No. - Num del Apt.)
City - Ciudad Zip Code - Zona Postal

3 If no street address, describe location of residence (cross street, route, box, section, township, range, etc.) - Si la calle no tiene num. describa la localidad: (Calles que atraviesan, etc.)

4 Mailing Address (if different) - Dirección Postal (si es diferente)
City - Ciudad State - Estado Zip Code - Zona Postal

5 Date of Birth - Fecha de nacimiento
(mo - mes / day - dia / year - año)

6 Occupation - Profesión

7 Name of State in USA or Foreign Country of Birth
Estado de EE.UU. o país de nacimiento

8 Telephone (Optional)
Teléfono (Opcional)

9 Political Party - Partido Político
(check one) (Indique uno)
☐ American Independent Party
☐ Democratic Party
☐ Libertarian Party
☐ Peace and Freedom Party
☐ Republican Party
☐ Decline to state—Se niega a declarar
☐ Other—Otro _____

10 I prefer election materials in . Prefiero materiales electorales en: (Check one) (Indique uno)
☐ English
☐ Español
☐ 中文

READ THE WARNING AND STATEMENT PRIOR TO SIGNING

I am a citizen of the United States and will be at least 18 years of age at the time of the next election. I am not imprisoned or on parole for the conviction of a felony. I certify under penalty of perjury that the information on this affidavit is true and correct.

LEA LA ADVERTENCIA Y DECLARACIÓN ANTES DE FIRMAR

Soy ciudadano de los Estados Unidos y tendré por lo menos 18 años de edad para la próxima elección. No estoy preso o bajo el régimen de libertad provisional por un crimen de un delito grave. Juro bajo pena de falso juramento que la información en esta Declaración Jurada es verdadero y correcto.

11 Signature - Firma ▶ Date - Fecha ▶

WARNING
Perjury is punishable by imprisonment in State prison for two, three, or four years. § 126 Penal Code.

AVISO
El juramento en falso es castigable con encarcelamiento en la prisión del estado por dos, tres, o cuatro años. § 126 Código Penal.

12 Signature of person assisting (if any)
Firma, de la persona que le ayuda (si hay alguno) ▶

13 PRIOR REGISTRATION PORTION:
SECCIÓN DE PREVIO EMPADRONAMIENTO:
If you are currently registered to vote fill in portion below. Si Ud. está empadronado actualmente para votar, llene las espacios abajo.

Name — Nombre
Former Address - Dirección Anterior
City - Ciudad County - Condado State - Estado
Political Party - Partido Político ZC 420409
OFFICE USE

120

BEST A

AVAILABLE COPY

NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

BUSINESS REPLY MAIL

FIRST CLASS PERMIT NO. 9814 SACRAMENTO, CA

POSTAGE WILL BE PAID BY
CALIFORNIA SECRETARY OF STATE

JAY PATTERSON
REGISTRAR OF VOTERS
155 CITY HALL
SAN FRANCISCO, CA 94102

121

REGISTER TO VOTE

VOTER INFORMATION

1. You must be a citizen of the United States.
2. You must be a resident of California.
3. You must be 18 years of age or older to vote.
4. You must *not* be in prison or on parole for the conviction of a felony.
5. In order to vote in any specific election you must be registered 29 days prior to that election. If your affidavit is complete, your registration is effective upon receipt by the county clerk or registrar of voters; however, you should not consider yourself registered until you receive a Voter Notification Card. If you do NOT receive a Voter Notification Card, call the county clerk or registrar of voters.
6. If you are unable to go to your polling place on election day, contact your county clerk or registrar of voters to request an absent voter ballot. A written application must be on file in that office at least 7 days before the election.
7. For elections information call the number listed below;
   Telephone: (415) 558-3417

INFORMACIÓN AL VOTANTE

1. Ud. debe ser ciudadano de los Estados Unidos.
2. Debe ser residente de California.
3. Debe haber cumplido los 18 años o mas de edad para poder votar.
4. *No* puede estar preso o bajo el régimen de libertad provisional por un crimen de un delito grave.
5. Para votor en una elección determinada Ud. debe de haberse empadronado 29 diás antes de la elección. Si su afidávit está completa, su empadronamiento entra en vigencia al ser recibida por el secretario del condado o el registrante de votantes; sin embargo, Ud. no deberá considerarse empadronado hasta que reciba una Tarjeta de Notificación al Votante. Si Ud. no recibe una Tarjeta de Notificación al Votante, llame al secretario del con-

dado o al registrante de votantes.

6. Sid Ud. no puede acudir a su lugar de votación el dia de la elección, póngase en contacto con el secretario del condado o el registrante de votantes, y pida una balota de votante ausente. La aplicación escrita tiene que estar actualmente en la oficina a lo menos siete dias antes de las eleccióones.
7. Para información electoral, llame al número que se indica a continuación:
   Teléfono: (415) 558-3417

JAY PATTERSON
REGISTRAR OF VOTERS
155 CITY HALL
SAN FRANCISCO, CA 94102

YOU MUST RE-REGISTER WHENEVER YOU MOVE
DEBE REGISTRARSE DE NUEVO SI CAMBIA DE RESIDENCIA

SAVE THIS PORTION FOR YOUR INFORMATION
GUARDE ESTA PORCION PARA SU INFORMACIÓN

(Detach here for mailing)

(Separe aqui para mandar por correo)

INSTRUCTIONS TO VOTER

TYPE OR PRINT IN INK: Read instructions and information carefully. Only your "signature" should be written, all other information should be printed or typed.

WARNING—STATEMENT UNDER PENALTY OF PERJURY: Be sure you read the statement located above and the warning below the signature line prior to signing your complete name. You must also sign the affidavit. If you are 17 years of age, you may register to vote provided you will be 18 on or before the date of the next election.

1. Print your complete name. A prefix (Mr., Mrs., Miss, Ms.) is not required.
2. Print your complete residence address (not P.O. Box), including City and Zip Code. Give the house, space, apt., or slip number. Enter the street name to include North, South, East, West, if appropriate, and indicate whether it is called ave., blvd., drive, place, street, road, lane, or circle, etc.
3. If no street address, describe location of residence: (cross streets, route, box, section, township, range, etc.).
4. Print your complete mailing address if different from residence address. Be sure to enter the route or box number, if any.
5. Print your complete date of birth.
6. Print the name of the state in U.S.A. or foreign country of birth.
7. Place an "X" in the box before the Qualified Political Party with which you choose to affiliate. In a direct primary election you will receive the ballot of the Qualified Political Party which you have selected.

If you do not affiliate with a qualified political party place an "X" in the box before the words "Decline to

State" or mark the box before "Other" and enter the name of any unqualified political party if you choose either of these, you will receive a non-partisan ballot, and will not be permitted to vote for party candidates at the primary election.

8. Print your specific occupation such as nurse, carpenter, homemaker, etc.
9. OPTIONAL: Telephone Number is optional. This number becomes public record if given.
10. Place an "X" in the appropriate box to receive your elections materials in the language you prefer.
11. After completing Affidavit (and Prior Registration Portion if appropriate) sign your name (as given in box #1) and date the Affidavit (in your normal handwriting).
12. If you receive assistance in completing this affidavit, have that person sign the affidavit below your signature.
13. PRIOR REGISTRATION PORTION: If you are registered to vote in another location, fill in the Prior Registration Portion of the affidavit giving your name, address, and party affiliation under which you are registered.

RETURN AFFIDAVIT TO COUNTY CLERK OR REGISTRAR OF VOTERS:

- If you return this card by mail, it must be dated and postmarked at least 29 days before the next election for your registration to be valid for that election.
- When you accept this card from someone who has filled it out, you must deliver it or mail it within 3 days to the address on the other side of this card.

INSTRUCCIONES AL VOTANTE

ESCRIBA A MAQUINA, O CON LETRAS DE MOLDE EN TINTA. Lea las instrucciones y la informacion cuidedosamente. Use su escritura normal y corriente soló al "firmar"; el resto de la informacion debe escribirse con letras de molde o a maquina.

ADVERTENCIA—DECLARACION BAJO PENA DE JURAMENTO EN FALSO: Antes de firmer su nombre complete, no olvide leer la advertencia y declaracion, situada encima de la linea indicada para su firma. Ud. debe también poner la fecha en la declaracion jurada (afidávit). Si Ud. tiene 17 años de edad, puede registrarse para votar siempre y cuando va a cumplir los 18 años en la fecha de la elección a antes de la misma.

1. Escriba su nombre complete usando letres de molde. No se requiere el use de un prefijo (Sr., Sra., Srta., Ms.).
2. Escriba la dirección complete de su residencia, usando letres de molde. Ponga el numero de la casa, puesta a muelle. Con el nombre de la calls, incluyo North, South, East, West (Norte, Sur, Este, Oeste) cuando existe tal designación, y tambien indique si se trota de ave., blvd., drive, place, street, road, lane, circle, etc. (avenida, bulevar, pesea, calle, corretora, collejón, etc.).
3. Si la calle no tiene núm. describa la localidad: (Calles que travesia, etc.)
4. Escriba con letra de molde su dirección postal completa, si es diferente de la dirección de su residencia. No olvide incluir of número de la ruta o del apartado postal, si existe.
5. Escribe su fecha complete de necimiento, con letras de molde.
6. Escribe con letras de molde el pais estranjero donde nacio, e el nombre del estado su nació en los Estados Unidos.

7. Ponga una "X" en la casilla delante del Partido Politico Capacitado, con el cual Ud. decide afiliarse. En una elección primera directa, Ud. recibirá la balote correspondiente el Partido Politico Capacitado que Ud. haya seleccionado. Si Ud. no se afilia a un partido politico capacitado, ponge una "X" delante de las palabras "Se niega a declarar," a marque la casilla delante de "Otro" y ponga alli el nombre de algun incapacitado partido politico. Si Ud morca cualquiera de estas dos últimas casillas, recibira una balota no partidoria, y no se le permitirá votar por candidatos partidaries en la elección primaria.
8. Escriba con letras de molde su profesion especifica, tal como enfermere, corpintero, emo de casa, etc.
9. OPCIONAL: Su número telefónico es opcional. Si Ud. le suministra, sera parte del registro disponible el publico.
10. Ponga una "X" on la casilla apropieda, para recibir su material electoral en el idioma que Ud. prefiera.
11. Despues de llenar el Afidávit (y la Sección de Provia Empadronamiento si corresponde) firma y ponga la fecha en el Afidávit (usando su escriture normal).
12. Si Ud. necesita asistencia y alguien le ayuda a llenar el afidávit, pidale a esa persona que firme el afidávit, debajo de su firma.
13. SECCION DE PREVIA EMPADRONAMIENTO: Si Ud. está empadronado actualmente para votar en cualquier luger, llene el afidávit, poniendo su nombre, dirección y el partido politico al cual estó actualmente afiliada.

DEVUELVA LA DECLARACION JURADA (AFIDAVIT) AL SECRETARIO DEL CONDADO O REGISTRADOR DE VOTANTES:

Si Ud. devuelva esta tarjeta por correo, la fecha y of matersellas debjen ser de por lo menos 29 dias antes de la

elección para que su registración sea válido para eso elección.

Cuando acepta esta tarjeta de alguien que la ha completado, Ud. debe entregarle o enviarla por correo dentro de 3 dias a la dirección que se encuentra en el otro lado de esta tarjeta.

ATTENTION VOTER:

If you do not mail your affidavit personally, have this receipt signed by the person who takes it from you and keep it until you receive your Voter Notification Card. This receipt will be used to investigate any cases in which that person does not mail or deliver it to the County Clerk or Registrar of Voters within the time limit required by law.

ATENCION VOTANTE:

Si Ud. no envia por correo su declaración jurada (afidavit) Ud. misma, pidalo a la persona a quiene Ud. se lo entrogo, que firme este recibe y ?????? Ud. con el mismo ????? que recibe su Tarjeta de Notificación el Votante. Este recibe se usera para investigar aquellas casos en que dicha persona no envio el afidvait para correo o no se lo entregó al Secretario del Condado (County Clerk) dentro del plase provista por le ley.

ZC 420409

Person Receiving Affidavit From Voter
Persona recibiendo el afidávit del votante

SIGNATURE-FIRMA

_____

Address-direccion

_____

_____

Telephone-telefono Date-fecha

EXHIBIT "B"

OFFICE OF THE DISTRICT ATTORNEY
MONTEREY COUNTY

Memorandum

TO: Mr. Ross Underwood
Election Department

DATE 4/21/82

FROM: John M. Phillips, Assistant D.A.

SUBJECT

As I mentioned in our telephone conversation, we are looking into the newly registered persons of foreign birth to determine what percentage of them are in fact eligible to vote. We are requesting, therefore, that you obtain in some random fashion the names and date of birth of 25 persons of new registration whose affidavit of registration reflect (1) a foreign country as a place of birth and (2) a preference for election material in a language other than English. We would request that said names and dates of birth be forwarded to us sometime before April 30, 1982 so that we can in turn forward it to the U.S. Attorney's office.

Again, we are requesting that this matter be kept strictly confidential between us.

ak

EXHIBIT "C"

ELECTION DEPARTMENT
MONTEREY COUNTY

Memorandum

TO: Mr. John M. Phillips, Asst. D.A.

DATE 4/30/82

FROM: Betty L. Bloomer, Asst. Registrar of Voters

SUBJECT: Attached Copies of Affidavits

Per your request dated 4/21/82, we are forwarding to you Certified Copies of the attached Affidavits of Registration. If We can be of any further assistance, contact our office.

blb

Exhibit C

May 4, 1982

Mr. Joseph P. Russoniello
UNITED STATES ATTORNEY
Northern District of California
16th Floor, Federal Building, Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

Dear Mr. Russoniello:

The District Attorney, Mr. William D. Curtis, has asked me to respond to your letter dated April 19, 1982 concerning the possible inappropriate voter registration of aliens.

As you requested, we asked the Monterey County Registrar of Voters to select at random, 25 persons whose affidavits of registration reflect foreign country as the place of birth and a preference for election materials in a language other than English. The affidavits selected by the Registrar of Voters are enclosed herewith.

If we understand correctly, you will check these 25 submissions with the Immigration and Naturalization Service to determine the number of these individuals who are ineligible to vote and you expect to give us the results of this review on or about May 7, 1982.

I trust the enclosures provide the information you require. If anything further is needed, please let me know. I can be reached at 408-758-4626.

Very truly yours,

Thomas A. Kenan
Administrative Assistant

TAK:smb
Enclosures

Exhibit D

U.S. Department of Justice

United States Attorney
Northern District of California

16th Floor Federal Building – Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

Branch Office
675 N. First Street, Suite 508
San Jose, California 95112

May 26, 1982

Honorable William D. Curtis
District Attorney
Monterey County
240 Church Street
Post Office Box 1369
Salinas, California 93902

Re: Primary Election: June 8, 1982
Possible Inappropriate Voter Registration
of Aliens

Dear Mr. Curtis:

I refer you to my letter to you dated April 19, 1982 and our subsequent written and telephonic communications regarding the above-captioned subject.

INTRODUCTION

Let me express my appreciation to you and to your staff and your colleagues in the County Registrar's Office without whose assistance and cooperation we would not

have been able to progress as far as we have in determining whether a problem exists that requires further action.

CONCLUSION

I regret but am compelled to say that in my judgment there *is* a serious problem that demands further attention.

ENCLOSURES

Enclosed find the following materials:

1. A spread sheet showing the overall statistical data developed from the respective submissions and the follow-up performed (an explanation of certain critical aspects follows).
2. A printout list of the information developed specifically with respect to your submission.
3. A copy of my May 6, 1982 letter to Secretary of State Eu stating my investigative objectives, the scope of the investigation, and a recommendation for modifying the Registration Affidavit format to minimize the apparent confusion registrants have faced and to eliminate fraud.
4. An interview sheet designed to elicit needed information regarding (a) eligibility to vote and (b) circumstances surrounding the involved registration.

THE SPREAD SHEET

Seven of the nine counties submitted information substantially in accordance with my April 19 request. Santa Cruz provided the names of over seventy persons who asked for bilingual voting materials but no birth dates. As soon as we receive the additional information we will be able to analyze the data we develop from the appropriate record check. San Francisco submitted seventy names; thirty-five of those represented U.S. born persons so there was no need to find out how many of these were U.S. citizens, presumably all were; of the other thirty-five, three re-

quested voting material in languages other than English and they are included in the analysis. The other names submitted were of little use in identifying any present problem of registering persons unlawfully.

Of the 168 names submitted for which bilingual voting materials were requested, 55 (37%) were positively identified as naturalized citizens, 45 (29%) were identified either positively as illegal aliens, probably legal permanent residents (LPRs) or possibly either illegal aliens or LPRs. For 68 persons (39.9%) neither the INS nor the FBI Identification Division had any record of these persons.

The spread sheet shows that further federal record checking is being done in our effort to further identify persons in columns No. 4, 5 and 6.

The absence of any record in either the FBI or INS systems is not conclusive that the person is ineligible to vote but it is presumptive of that fact for the reason that until February 1982 all persons who were fingerprinted in the course of pursuing naturalization had their fingerprints forwarded to the Identification Division of the FBI where they were permanently stored. If their fingerprints are not found in the Identification Files, a strong presumption exists that they have not been naturalized. This does not, of course, eliminate the possibility that they have "derivative citizenship" acquired because one or both parents were U.S. citizens and they acquired citizenship automatically thereby, but the interviews should establish such a fact, if it is a fact.

THE INTERVIEW

a) *Conducting of Interviews*

There is not now any reason to believe that any of the persons registered to vote who are subjects of interviews have deliberately made a false statement regarding their eligibility though such evidence may develop later.

If for any reason you are unable to conduct the interviews I would appreciate your earliest advice of this fact so other arrangements can be made to get this done.

b) *The Interview Sheet*

For consistency and to facilitate the obtaining of information I recommend you use the Interview Sheet enclosed. It is self-explanatory and focuses on (a) the basis claimed for citizenship, (b) the name of the person at the time of naturalization, (c) the date and location of naturalization, (d) identification of any documents supporting the claim of citizenship and, in the case of persons who are not citizens (e) the circumstances surrounding their registering to vote.

PRESS ADVISORY

You will recall that I earlier advised by April 19 letter that I saw no reason to issue any press advisory until after the interviews were conducted (page 3, paragraph 6), but delaying any statement will not be possible now in light of the extensive coverage this investigation has already received. I propose to advise the media on Friday, May 28, 1982 what the preliminary results are and that further investigation has been requested and is being undertaken. Any further thoughts on this matter would be appreciated.

Even on the basis of the preliminary review and before deciding that the "NO RECORDS" are, for the most part, ineligible to vote, I suggest you advise your respective Registrars of the results to alert them to the facts.

I will be in touch with you further by phone to discuss any other appropriate action.

Very truly yours,

/s/ JOSEPH P. RUSSONIELLO

Joseph P. Russoniello
United States Attorney

Enclosures

COUNTY	TOTAL # OF NAMES SUBMITTED (1)	TOTAL # REQ'ING BILINGUAL BALLOTS (2)	POSITIVE INDEX AS CITIZENS (3)	LPRs (4)	ILLEGAL ALIEN (5)	OTHER QUESTIONABLE (6)	PROB. MILITARY DESERTERS (7)	NO FBI OR INS RECORD (8)	FBI CHECK PENDING (9)	TO BE INTERVIEWED (10)
ALAMEDA	32	32	10	6	1	5	0	12	5	22
CONTRA COSTA	25	25	12	1	1	3	0	8	2	12
SAN MATEO	25	25	8	2	0	5	0	10	5	17
SANTA CLARA	25	25	8	1	1	0	0	15	1	17
MAPS	23 (22)	23 (22)	8 (7)	3	1	4	0	7	2	16
MONTEREY	21	21	6	5	0	1	0	9	1	15
SONOMA	16 (15)	15	4	3	1	2	0	6 (5)	1	11 (10)
SAN FRANCISCO	35	3	0	0	0	1	0	2	0	3
TOTALS		168	55	19	5	31		68		
			32.7% of total		45 27.4% of total			39.9% of total		

EXHIBIT "E"

INTERVIEW SHEET

NAME _____ DATE OF INTERVIEW _____

MAIDEN NAME (if applicable) _____

ARE YOU A CITIZEN OF THE U.S. YES ___ NO ___ NOT SURE ___

IF YOU ARE A CITIZEN, HOW DID YOU ACQUIRE IT?

a) BORN IN U.S. _____

b) NATURALIZATION _____

c) OTHER (explain) _____

_____

_____

_____

_____

IF BY NATURALIZATION,

a) FULL NAME WHEN NATURALIZED _____

b) PLACE WHERE NATURALIZED _____

c) YEAR OF NATURALIZATION _____

d) ANY DOCUMENTS? DESCRIBE _____

_____

IF NOT A CITIZEN, BUT REGISTERED TO VOTE,

a) DID SOMEONE ASSIST YOU IN REGISTERING? YES _____ NO _____

b) IF YES, WHO? _____

c) IF YES, BUT DON'T KNOW NAME OF PERSON, WHEN AND WHERE (e.g. door to door campaign, on street, supermarket, dance, political event, etc.)? _____

_____

d) DID PERSON IDENTIFY ORGANIZATION OR AFFILIATION? _____

e) IF SO, WHAT ORGANIZATION? _____

_____

NAME OF INTERVIEWER

EXHIBIT "F"

INTERVIEW SHEET

NAME _____ DATE OF INTERVIEW _____

MAIDEN NAME (if applicable) _____

ARE YOU A CITIZEN OF THE U.S. YES ___ NO ___ NOT SURE ___

IF YOU ARE A CITIZEN, HOW DID YOU ACQUIRE IT?

a) BORN IN U.S. _____

b) NATURALIZATION _____

c) OTHER (explain) _____

_____

_____

_____

_____

IF BY NATURALIZATION,

a) FULL NAME WHEN NATURALIZED _____

b) PLACE WHERE NATURALIZED _____

c) YEAR OF NATURALIZATION _____

d) ANY DOCUMENTS? DESCRIBE _____

_____

IF NOT A CITIZEN, BUT REGISTERED TO VOTE,

a) DID SOMEONE ASSIST YOU IN REGISTERING? YES _____ NO _____

b) IF YES, WHO? _____

_____

NAME OF INTERVIEWER

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFF,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

AFFIDAVIT OF DAVID N. ILCHERT

I, DAVID N. ILCHERT, BEING DULY SWORN, DEPOSE AND SAY AS FOLLOWS:

(1) I am the District Director of the Immigration and Naturalization Service for the San Francisco, California District.

(2) I have personal knowledge of the facts stated herein.

(3) I have jurisdiction over immigration matters within the State of Nevada and the northen counties of California by delegation from the Attorney General of The United States.

(4) I am the custodian of records of the Immigration and Naturalization Service which are within my jurisdiction.

(5) The records of the Immigration and Naturalization Service are subject to the provisions and exemptions of Section 552, Title 5, of the United States Code (known as the Freedom of Information Act) and Section 552a, Title 5, of the United States Code (known as the Privacy Act).

(6) I have authority to grant or deny requests for information from records of the Immigration and Naturalization Service which are sought.

(7) Requests for information from records of the Immigration and Naturalization Service were made by Joseph P. Russoniello, United States Attorney, who is the Chief Federal law enforcement officer for the Northern District of California.

(8) The information which was requested by the United States Attorney was for verification of the citizenship or immigration status of named individuals.

(9) Information obtained from Immigration and Naturalization Service records concerning the citizenship or immigration status of named individuals, where available from Service records, was transmitted to the United States Attorney in compliance with his request.

(10) In order to respond with the utmost accuracy to Mr. Russoniello's request, Service officers also reviewed Federal and State court naturalization records which are public records and transmitted information so obtained.

(11) It is the official position of the Immigration and Naturalization Service that status information which merely identifies a person's citizenship or immigration status is not information covered by the provisions of the Privacy Act. Such information would be provided to any requesting party. Most information regarding citizenship status can be obtained from Federal or State court records which are a matter of public record.

(12) Even if information pertaining to citizenship or immigration status were subject to the provisions of the Freedom of Information Act or the Privacy Act, the Freedom of Information Act

requires the release of such information unless expressly exempted from disclosure by the Freedom of Information Act.

(13) I know of no such exemption which would allow us to refuse to disclose information on the citizenship or immigration status of an individual.

(14) The term "Agency" is defined in the Freedom of Information Act such as to include the whole Department of Justice of which the office of the United States Attorney and the Immigration and Naturalization Service are components. As an officer of the same Agency as the Immigration and Naturalization Service, the United States Attorney has access to records of the Immigration and Naturalization Service.

(15) It is my understanding that a District Director of the Immigration and Naturalization Service is authorized to make disclosure of information covered by the terms of the Freedom of Information Act and Privacy Act to an agency engaged in a law enforcement investigation where records indicate a potential violation of law.

(16) A failure to disclose information not exempt from disclosure may subject the Immigration and Naturalization Service or myself to possible civil or criminal penalties.

(17) In my opinion I am compelled by law to disclose information pertaining to the citizenship or immigration status of individuals which is contained in records of the Immigration and Naturalization Service. Even if such disclosure is not mandatory it is permissible and within my authority. The actions taken by me which are referred to in paragraphs nine (9) and ten (10) above were taken with the belief that such actions were in full compliance with applicable law.

(18) I was not, at the time of my actions stated herein, nor have I ever been aware at anytime of any statutory or constitutional rights of any individuals which would be violated by the verification of citizenship or immigration status upon the request of a United States Attorney.

/s/ DAVID W. ILCHERT
David W. Ilchert
District Director
Immigration & Naturalization Service

Subscribed and sworn to before me
at San Francisco, California this
27th day of August 1982.

CHRIS JAY
Chris Jay
Notary Public

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

DECLARATION OF EEVE LEWIS

I, EVE LEWIS, hereby declare as follows:

1. I am, and at pertinent times was, the Registrar of Voters for the County of Sonoma.

2. In April, 1982, my office was requested by Mr. Gene L. Tunney, District Attorney for the County of Sonoma, to provide a sampling of voter names as initially requested by Mr. Joseph P. Russoniello, United States Attorney for the Northern District of California.

3. My office took a sample of 16 names as requested and forwarded the information to the Office of the United States Attorney for the Northern District of California.

4. All information provided came from public records, available to any member of the public upon appropriate request.

5. I am required by law to provide such public information upon appropriate request.

6. I see nothing illegal or improper about the above request or about my actions in complying with it.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 22nd day of September, 1982, at Santa Rosa, California.

/s/ EVE LEWIS
Eeve Lewis

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL., PLAINTIFF,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS.

DECLARATION OF GEORGE MANN

I, GEORGE MANN, declare that:

1. I am the Registrar of Voters for Santa Clara County and I have been the Registrar for fifteen (15) years.

2. I am personally knowledgeable of those matters stated hereafter, except as to those matters with respect to which I am informed and believe them to be true, which information and belief is asserted hereafter as to such matters, where appropriate.

3. After reading an article in the San Jose Mercury News on February 8, 1981, I orally requested the District Attorney's Office to investigate possible voter registration fraud in this County.

4. I cooperated in good faith with requests from the Santa Clara County District Attorney's Office for information concerning persons registered to vote in this County.

Dated: September 20, 1982.

/s/ GEORGE MANN
George Mann *Registrar of Voters*

SGL:lg

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF ALAMEDA

No. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL., PLAINTIFF,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS.

DECLARATION OF JOHN J. MEEHAN

I, JOHN J. MEEHAN declare that:

1. I am District Attorney in and for the County of Alameda, State of California.

2. I am personally knowledgeable of the matters stated hereafter except as to those matters with respect to which I am informed and believe to be true, which information and belief is asserted hereafter as to such matters where appropriate.

3. On or about April 19, 1982 I received a letter from the United States Attorney for the Northern District of California, Joseph P. Russoniello. The said letter which is attached hereto as Exhibit 1 and by this reference made a part hereof, requested that I provide to the U.S. Attorney the names and dates of birth of 25 persons randomly selected whose affidavits of registration on Alameda County's election rolls indicated a foreign country as place of birth and a preference for election materials in a language other than English. (A copy of an identical letter, directed by Mr. Russoniello to Honorable William

O'Malley, District Attorney for Contra Costa County, is included as Exhibit 1, to plaintiffs' original complaint in this action.)

4. Sometime after receiving the aforementioned letter from Mr. Russoniello and in response to the requests contained therein, my office commenced an investigation concerning the existence of any illegality in voter registration practices, which investigation is ongoing. It is also my belief that inasmuch as this criminal investigation is ongoing, that any all information pertaining to it is privileged from discovery.

5. It is my opinion and belief however, as an attorney with over 20 years experience in this office that there is no illegality or irregularity in the manner in which this investigation was initiated or has been conducted by any of the offices involved.

Dated:

/s/ JOHN J. MEEHAN

John J. Meehan
District Attorney in and for
The County of Alameda,
State of California

April 19, 1982

Honorable John J. Meehan
District Attorney
Alameda County
Courthouse
1225 Fallon Street, Room 900
Oakland, California 94612

Re: Primary Election: June 8, 1982
Possible Inappropriate Voter Registration
of Aliens

Dear Mr. Meehan:

Your county, together with the counties of Contra Costa, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz and Sonoma, has previously been identified as effected by the provisions of 42 United States Code, Section 1973aa-1a and following, commonly known as the Bilingual Election Requirement. Those provisions require that each effected country provide "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots," in the Spanish language and, in the case of San Francisco County, in the Chinese language in addition to English.

As a corollary to the effected counties' efforts to comply, several groups have undertaken voter registration drives targeted toward registering individuals whose primary language is Spanish or Chinese and we do not challenge their right to do so. However, an investigation undertaken by the Santa Clara County District Attorney at the request of Voter Registrar George Mann beginning in about February 1981, disclosed that with respect to a test

sample of 100 newly-registered persons of foreign birth, twenty were determined not to be U.S. Citizens and eleven others could not be located. The investigation disclosed that those persons who were not U.S. Citizens, but who did register erroneously, believed they were eligible to vote because they were either married to U.S. Citizens or had been residents of the United States for a long period of time.

We are concerned, as I am sure you are, that if as many as thirty percent of the newly-registered foreign born persons vote even though they are not eligible to do so, especially given the expected intensive effort to register non-English speaking persons, the elections to be held June 8 may be so effected that the results are subject to court challenge. Any successful challenge will mean considerable expense, both to the counties and to the candidates involved therein.

It is too early to sound any alarm but there is, in my judgment, a sufficient basis for our undertaking some mutual effort to determine the extent to which persons are being registered who are not entitled to vote. If such be the case it seems to me that the fault or blame, if any need be leveled, lies with the registration affidavit form itself in that even though question No. 6 asks for the state in the USA or foreign country of birth, there is no follow-up question eliciting information as to the date and place of naturalization if a foreign country *is* the place of birth. Even though the affidavit contains the statement, "I am a citizen of the United States . . . ," as has previously been shown, a significant number of persons believed that citizenship was synonomous with residency and/or could be acquired by marriage alone. (I enclose a copy of the affidavit which I understand is used in one form or another in your county for your information.)

Before any accurate assessment can be made that we have a problem with respect to the June election, we should at

least sample the newly-registered persons of foreign birth to determine what percentage of them are in fact eligible to vote and to that end I propose the following:

1. Through your good offices, the Registrar of Voters should be asked to submit at random the names and dates of birth of twenty-five persons of new registration, whose affidavits of registration reflect (1) a foreign country as the place of birth and (2) a preference for election materials in a language other than English.

2. Those names and dates of birth should be forwarded to us not later than April 30, 1982.

3. Upon receipt, we will forward the twenty-five names received from your Registrar and the twenty-five names received from the Registrars in all other counties aforenamed to the Immigration and Naturalization Service who will scan their computer for the purpose of determining the number of persons known to be naturalized or, in the alternative, known to be resident aliens ineligible to vote. They will report their results to us and we will pass them on to you by no later than May 7, 1982.

4. As to each person with respect to whom we are unable to state with surety that he/she has been naturalized, a follow-up interview should be conducted by your office to determine (1) the basis upon which they claim citizenship and entitlement to vote and (2) in cases in which they are unable to prove citizenship, what representations were made to them by Registrars as to their qualification to vote. These follow-up interviews should be given priority so that all investigations are completed by May 21.

5. On May 24 we will check with each DA's office to determine the results of their investigation and will report to each office on May 25 the results of the overall investigation.

6. Depending upon those results and the extent to which inappropriate registration is determined, we should

decide by mutual agreement what further action to take. In this connnection, a joint press conference alerting the general public and prospective unauthorized voters in particular of the results of our investigation might be appropriate. Alternatively, the respective Registrars may choose to take some action with regard to each potential voter effected by our survey to require proof of citizenship before permitting that person to vote. The various alternatives will require considerable discussion and your input as well as the input of the Registrar of Voters who might be required to take some action.

For our part, we do not contemplate initiating prosecutions against individual registrants as we are empowered to do pursuant to the provisions of 42 U.S.C., Section 1973dd-3(c), but will seriously consider such prosecutions against persons whom the evidence shows deliberately "conspired with another individual for the purpose of encouraging the giving of false information in order to establish the eligibility of any individual to register . . ." Your would of course be free to pursue whatever action you deemed appropriate as provided for in Section 29200 of the California Elections Code.

Because of the sensitivity of this matter and because it is premature to suggest that the June 8 election is in jeopardy, we will refrain from issuing any press advisory or making any statement regarding this ongoing investigation and will consult with you before taking any such action. I would appreciate your doing likewise and hearing from you if you consider some media notification to be appropriate at this time.

If you have any question concerning the foregoing or would like to discuss the matter further, Chief Assistant United States Attorney William T. McGivern (556-8477) will be

coordinating the effort on our end and will make himself available to discuss planning with you.

Very truly yours,

JOSEPH P. RUSSONIELLO
United States Attorney

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; WILLIAM A. O'MALLEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY OF CONTRA COSTA COUNTY; ET AL., DEFENDANTS.

DECLARATION OF WILLIAM A. O'MALLEY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, WILLIAM A. O'MALLEY, declare that:

1. I am, and during all the times referred to herein was, the duly elected District Attorney of the County of Contra Costa, California.

2. I am personally knowledgeable of those matters stated herein, except as to those matters with respect to which I am informed and believe them to be true, which information and belief is asserted hereafter as to such matters, where appropriate.

3. On or about April 20, 1982, I received a letter dated April 19, 1982, from Joseph P. Russoniello, whom I knew to be the United States Attorney for the Northern District of California. In that letter, Mr. Russoniello informed me of an investigation conducted by the Santa Clara County District Attorney's Office beginning in February, 1981, which showed that, in that county, of one hundred (100)

newly registered persons of foreign birth, twenty (20) were found not to be United States citizens and eleven (11) others could not be located. Mr. Russoniello further informed me that of those person who were not United States citizens, but were registered to vote, believed they were eligible to vote because they were married to United States citizens or had resided in the United States for a long period of time.

Based on that information, Mr. Russoniello asked me to forward to our County Registrar of Voters a request to submit a random sampling of twenty-five (25) names of foreign born voter registrants who also requested bilingual materials and to send those names to the United States Attorney's Office to be checked against the Immigration and Naturalization Service list of naturalized citizens and resident aliens. A true and correct copy of that letter is attached hereto and designated Exhibit A and incorporated as if set forth fully herein.

4. Based on the information contained in Mr. Russoniello's letter, I determined that sufficient cause existed to investigate the incidence of voters in Contra Costa County who may have registered to vote under the erroneous belief that they were eligible to vote either because of marriage to a United States citizen or lengthy stay in this country. I believed that that type of a misunderstanding was most likely to arise among voters who were foreign born and who relied on conditions of eligibility translated into another language on the voter registration forms. I also believed that the proper and least intrusive method of initiating such an investigation was by comparing lists of foreign born voter registrants who requested bilingual materials against an official list of naturalized United States citizens and resident aliens.

5. Therefore, on a date unknown, but within one (1) week of receiving the letter from Mr. Russoniello, I forwarded a copy of the letter to Lon Underwood, Registrar

of Voters for Contra Costa County, and asked Mr. Underwood to comply with Mr. Russoniello's request.

6. On April 23, 1982, I forwarded to the United States Attorney a list of twenty-five (25) randomly selected names of voter registrants who requested bilingual ballot materials.

7. Shortly after May 26, 1982, I received a second letter from Mr. Russoniello informing me, by way of an attached statistical breakdown sheet, that, of the twenty-five (25) names submitted to the United States Attorney's Office, twelve (12) were positively identified as citizens, one (1) was a legal permanent resident, one (1) was an illegal alien, three (3) were of questionable status, and eight (8) had no INS record on file. Mr. Russoniello asked me to interview those who were of questionable status or had no INS record on file as to whether or not they were citizens, if they were born in the United States or naturalized, if naturalized, where and when, and how the person was registered and by whom. A true and correct copy of that letter and the statistical breakdown sheet is attached hereto and designated as Exhibit B and incorporated as if set forth fully herein.

8. Based on the information contained in Mr. Russoniello's letter of May 26, 1982, I formed the opinion that some of the voter registrants whose names were sent to the United States Attorney's Office were, in fact, ineligible to vote. However, I also formed the opinion at that time that insufficient cause existed to believe that any criminal intent existed in the method used to register those people to vote.

9. Therefore, I directed members of my staff to send letters to those twelve (12) persons who were not identified as United States citizens or resident aliens to determine if, in fact, they were naturalized citizens. I directed that the letters addressed to those persons ask only about their citizenship status and not about the manner in which the person was registered to vote. A true and correct copy of

that letter and its attached questionnaire is attached hereto and designated Exhibit C and incorporated as if set forth fully herein.

10. Of those twelve (12) letters, I received a response from eight (8) persons, six (6) of whom gave information verifying their naturalization and two (2) of whom admitted that they were not United States citizens. Four (4) of the twelve (12) letters were returned not deliverable, "Moved, left no forwarding address", and were returned after a second attempt to deliver them by registered mail.

11. After reviewing the responses from the above eight (8) persons, I formed the opinion that there was insufficient evidence of any criminal intent with respect to their registering to vote. I determined at that time that, absent a showing of violation of law, no further investigation was required.

12. I am informed and based on that information I believe that on September 10, 1982, at the request of United States Attorney Russoniello, FBI Agent Dietrick requested the voting status information which my office had obtained from those persons whom we had contacted and attempted to contact. I am informed by Contra Costa County Senior Deputy District Attorney Gary Yancey and based on that information I believe that Mr. Yancey furnished Agent Dietrick with the names of the four (4) persons we could not contact and the information we had received from those eight (8) persons who responded to our letter.

I declare under penalty of perjury that the foregoing is true and correct of my own knowledge except as to those matter of which I am informed and believe, as to those matters, based on the information received, I believe them to be true.

Executed this 22nd day of September, 1982, at Martinez, California.

/s/ WILLIAM A. O'MALLEY

William A. O'Malley
District Attorney
Contra Costa County

Exhibit A

U.S. Department of Justice

United States Attorney
Northern District of California

16th Floor Federal Building – Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

Branch Office
675 N. First Street, Suite 508
San Jose, California 95112

April 19, 1982

Honorable William A. O'Malley
District Attorney
Contra Costa County
Post Office Box 670
Courthouse
Main and Court Street
Martinez, California 94553

Re: Primary Election: June 8, 1982 –
Possible Inappropriate Voter Registration
of Aliens

Dear Mr. O'Malley:

Your county, together with the counties of Alameda, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz and Sonoma, has previously been identified as effected by the provisions of 42 United States Code, Section 1973aa-1a and following, commonly known as the Bilingual Election Requirement. Those provisions require that each effected county provide "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process,

including ballots," in the Spanish language and, in the case of San Francisco County, in the Chinese language in addition to English.

As a corollary to the effected counties' efforts to comply, several groups have undertaken voter registration drives targeted toward registering individuals whose primary language is Spanish or Chinese and we do not challenge their right to do so. However, an investigation undertaken by the Santa Clara County District Attorney at the request of Voter Registrar George Mann beginning in about February 1981, disclosed that with respect to a test sample of 100 newly-registered persons of foreign birth, twenty were determined not to be U.S. Citizens and eleven others could not be located. The investigation disclosed that those persons who were not U.S. Citizens, but who did register erroneously, believed they were eligible to vote because they were either married to U.S. Citizens or had been residents of the United States for a long period of time.

We are concerned, as I am sure you are, that if as many as thirty percent of the newly-registered foreign born persons vote even though they are not eligible to do so, especially given the expected intensive effort to register non-English speaking persons, the elections to be held June 8 may be so effected that the results are subject to court challenge. Any successful challenge will mean considerable expense, both to the counties and to the candidates involved therein.

It is too early to sound any alarm but there is, in my judgment, a sufficient basis for our undertaking some mutual effort to determine the extent to which persons are being registered who are not entitled to vote. If such be the case it seems to me that the fault or blame, if any need be leveled, lies with the registration affidavit form itself in that even though question No. 6 asks for the state in the USA or foreign country of birth, there is no follow-up

question eliciting information as to the date and place of naturalization if a foreign country *is* the place of birth. Even though the affidavit contains the statement, "I am a citizen of the United States . . . ," as has previously been shown, a significant number of persons believed that citizenship was synonomous with residency and/or could be acquired by marriage alone. (I enclose a copy of the affidavit which I understand is used in one form or another in your county for your information.)

Before any accurate assessment can be made that we have a problem with respect to the June election, we should at least sample the newly-registered persons of foreign birth to determine what percentage of them are in fact eligible to vote and to that end I propose the following:

1. Through your good offices, the Registrar of Voters should be asked to submit at random the names and dates of birth of twenty-five persons of new registration, whose affidavits of registration reflect (1) a foreign country as the place of birth and (2) a preference for election materials in a language other than English.

2. Those names and dates of birth should be forwarded to us not later than April 30, 1982.

3. Upon receipt, we will forward the twenty-five names received from your Registrar and the twenty-five names received from the Registrars in all other counties aforenamed to the Immigration and Naturalization Service who will scan their computer for the purpose of determining the number of persons known to be naturalized or, in the alternative, known to be resident aliens ineligible to vote. They will report their results to us and we will pass them on to you by no later than May 7, 1982.

4. As to each person with respect to whom we are unable to state with surety that he/she has been naturalized, a follow-up interview should be conducted by your office to determine (1) the basis upon which they claim citizenship and entitlement to vote and (2) in cases in

which they are unable to prove citizenship, what representations were made to them by Registrars as to their qualification to vote. These follow-up interviews should be given priority so that all investigations are completed by May 21.

5. On May 24 we will check with each DA's office to determine the results of their investigation and will report to each office on May 25 the results of the overall investigation.

6. Depending upon those results and the extent to which inappropriate registration is determined, we should decide by mutual agreement what further action to take. In this connnection, a joint press conference alerting the general public and prospective unauthorized voters in particular of the results of our investigation might be appropriate. Alternatively, the respective Registrars may choose to take some action with regard to each potential voter effected by our survey to require proof of citizenship before permitting that person to vote. The various alternatives will require considerable discussion and your input as well as the input of the Registrar of Voters who might be required to take some action.

For our part, we do not contemplate initiating prosecutions against individual registrants as we are empowered to do pursuant to the provisions of 42 U.S.C., Section 1973dd-3(c), but will seriously consider such prosecutions against persons whom the evidence shows deliberately "conspired with another individual for the purpose of encouraging the giving of false information in order to establish the eligibility of any individual to register . . ." Your would of course be free to pursue whatever action you deemed appropriate as provided for in Section 29200 of the California Elections Code.

Because of the sensitivity of this matter and because it is premature to suggest that the June 8 election is in jeopardy, we will refrain from issuing any press advisory or making

any statement regarding this ongoing investigation and will consult with you before taking any such action. I would appreciate your doing likewise and hearing from you if you consider some media notification to be appropriate at this time.

If you have any question concerning the foregoing or would like to discuss the matter further, Chief Assistant United States Attorney William T. McGivern (556-8477) will be coordinating the effort on our end and will make himself available to discuss planning with you.

Very truly yours,

/s/ JOSEPH P. RUSSONIELLO
Joseph P. Russoniello
United States Attorney

Enclosure

EXHIBIT B

U.S. Department of Justice

United States Attorney
Northern District of California

16th Floor Federal Building – Box 36055
450 Golden Gate Avenue
San Francisco, California 94102

Branch Office
675 N. First Street, Suite 508
San Jose, California 95112

May 26, 1982

Honorable William A. O'Malley
District Attorney
Contra Costa County
Post Office Box 670
Courthouse
Main and Court Street
Martinez, California 94553

Re: Primary Election: June 8, 1982
Possible Inappropriate Voter Registration
of Aliens

Dear Mr. O'Malley:

I refer you to my letter to you dated April 19, 1982 and our subsequent written and telephonic communications regarding the above-captioned subject.

INTRODUCTION

Let me express my appreciation to you and to your staff and your colleagues in the County Registrar's Office without whose assistance and cooperation we would not have been able to progress as far as we have in determining whether a problem exists that requires further action.

CONCLUSION

I regret but am compelled to say that in my judgement there *is* a serious problem that demands further attention.

ENCLOSURES

Enclosed find the following materials:

1. A spread sheet showing the overall statistical data developed from the respective submissions and the follow-up performed (an explantion of certain critical aspects follows).
2. A printout list of the information developed specifically with respect to your submission.
3. A copy of my May 6, 1982 letter to Secretary of State Eu stating my investigative objectives, the scope of the investigation, and a recommendation for modifying the Registration Affidavit format to minimize the apparent confusion registrants have faced and to eliminate fraud.
4. An interview sheet designed to elicit needed information regarding (a) eligibility to vote and (b) circumstances surrounding the involved registration.

THE SPREAD SHEET

Seven of the nine counties submitted information substantially in accordance with my April 19 request. Santa Cruz provided the names of over seventy persons who asked for bilingual voting materials but no birth dates. As soon as we receive the additional information we will be able to analyze the data we develop from the appropriate record check. San Francisco submitted seventy names; thirty-five of those represented U.S. born persons so there was no need to find out how many of these were U.S. citizens, presumably all were; of the other thirty-five, three re-

quested voting material in languages other than English and they are included in the analysis. The other names submitted were of little use in identifying any present problem of registering persons unlawfully.

Of the 168 names submitted for which bilingual voting materials were requested, 55 (37%) were positively identified as naturalized citizens, 45 (29%) were identified either positively as illegal aliens, probably legal permanent residents (LPRs) or possibly either illegal aliens or LPRs. For 68 persons (39.9%) neither the INS nor the FBI Identification Division had any record of these persons.

The spread sheet shows that further federal record checking is being done in our effort to further identify persons in columns No. 4, 5 and 6.

The absence of any record in either the FBI or INS systems is not conclusive that the person is ineligible to vote but it is presumptive of that fact for the reason that until February 1982 all persons who were fingerprinted in the course of pursuing naturalization had their fingerprints forwarded to the Identification Division of the FBI where they were permanently stored. If their fingerprints are not found in the Identification Files, a strong presumption exists that they have not been naturalized. This does not, of course, eliminate the possibility that they have "derivative citizenship" acquired because one or both parents were U.S. citizens and they acquired citizenship automatically thereby, but the interviews should establish such a fact, if it is a fact.

THE INTERVIEW

a) *Conducting of Interviews*

There is not now any reason to believe that any of the persons registered to vote who are subjects of interviews have deliberately made a false statement regarding their eligibility though such evidence may develop later.

If for any reason you are unable to conduct the interviews I would appreciate your earliest advice of this fact so other arrangements can be made to get this done.

b) *The Interview Sheet*

For consistency and to facilitate the obtaining of information I recommend you use the Interview Sheet enclosed. It is self-explanatory and focuses on (a) the basis claimed for citizenship, (b) the name of the person at the time of naturalization, (c) the date and location of naturalization, (d) identification of any documents supporting the claim of citizenship and, in the case of persons who are not citizens (e) the circumstances surrounding their registering to vote.

PRESS ADVISORY

You will recall that I earlier advised by April 19 letter that I saw no reason to issue any press advisory until after the interviews were conducted (page 3, paragraph 6), but delaying any statement will not be possible now in light of the extensive coverage this investigation has already received. I propose to advise the media on Friday, May 28, 1982 what the preliminary results are and that further investigation has been requested and is being undertaken. Any further thoughts on this matter would be appreciated.

Even on the basis of the preliminary review and before deciding that the "NO RECORDS" are, for the most part, ineligible to vote, I suggest you advise your respective Registrars of the results to alert them to the facts.

I will be in touch with you further by phone to discuss any other appropriate action.

Very truly yours,

/s/ JOSEPH P. RUSSONIELLO

Joseph P. Russoniello
United States Attorney

Enclosures

COUNTY	TOTAL # OF NAMES SUBMITTED (1)	TOTAL # REQ'ING BILINGUAL BALLOTS (2)	POSITIVE IDENT AS CITIZENS (3)	LPRs (4)	ILLEGAL ALIEN (5)	OTHER QUESTIONABLE (6)	PEND. MILITARY DEFERMENTS (7)	NO FBI OR INS RECORD (8)	FED CHECK PENDING (9)	NO BE INTERVIEWED (10)
ALAMEDA	32	32	10	4	1	5	0	12	5	22
CONTRA COSTA	25	25	12	1	1	3	0	8	2	12
SAN MATEO	25	25	8	2	0	5	0	10	5	11
SANTA CLARA	25	25	8	1	1	0	0	15	1	17
NAPA	23 (22)	23 (22)	8 (7)	3	1	4	0	7	2	16
MONTEREY	21	21	6	5	0	1	0	9	1	15
SONOMA	16 (15)	15	4	3	1	2	0	6 (5)	1	11 (10)
SAN FRANCISCO	35	3	0	0	0	1	0	2	0	3
TOTALS		168	55	19	5	21		68		
					45					
			32.7% of total		27.4% of total			39.9% of total		

EXHIBIT C

Office of District Attorney
Contra Costa County

Court House, Fourth Floor
P.O. Box 670
Martinez, California 94553
(415) 372-4500

William A. O'Malley
District Attorney

June 8, 1982

Estimado(a)

It has been brought to the attention of this office that there is a problem in verifying the accuracy of your voter registration in Contra Costa County. Your cooperation in resolving an ambiguity as to your citizenship status would be of great help in determining whether or not you are properly registered to vote.

Enclosed is a short questionaire [sic] which will elicit the necessary information. Please answer all the questions, then sign and return the form in the self-addressed, stamped envelope provided.

If you have questions please feel free to call Sylvia Galvez at 372-4531.

Thank you for your cooperation in this matter.

Ha llegado a la atención de esta oficina que hay un problema en verificar la exactitud de su registración de vontante en el Condado de Contra Costa. Su cooperación en resolver la incertidumbre de su estado de ciudadaniá seriá de gran ayuda en determinar si esta registrado debidamente para votar o no.

Un corto cuestionario está incluido el cual evocará la información necesaria. Por favor conteste todas las preguntas, luego firme y regrese la forma en el sobre cellado.

Si tiene alguna pregunta, por favor llame a Sylvia Gálvez en el 372-4531.

Gracias por su cooperación en este asunto.

Very truly yours,
Sinceramente

WILLIAM A. O'MALLEY
District Attorney
Abogado del Distrito

/s/ GARY T. YANCEY
Gary T. Yancey
Senior Deputy District Attorney
Asistente Abogado de Distrito

GTY/dc

Enclosure
Incluidos

QUESTIONNAIRE

CUESTIONARIO

NAME _____ DATE _____
NOMBRE FECHA

MAIDEN NAME (if applicable _____
APELLIDO DE SOLTERA (si aplica)

1. ARE YOU A CITIZEN OF THE U.S.? YES ___ NO ___
   ES UD. CIUDADANO DE LOS ESTADOS UNIDOS?

2. IF YOU ARE A NATURALIZED CITIZEN:
   SI ES UD. CIUDADANO NATURALIZADO:
   a) FULL NAME WHEN NATURALIZED _____
   NOMBRE COMPLETO CUANDO SE NATURALIZO

   b) PLACE WHERE NATURALIZED _____
   LUGAR DONDE SE NATURALIZO

   c) YEAR OF NATURALIZATION _____
   AÑO DE LA NATURALIZACION

3. ANY COMMENTS YOU WISH TO MAKE CONCERNING YOUR CITIZENSHIP STATUS IF YOU WERE NOT BORN IN THE U.S. NOR NATURALIZED.

   ANOTE COMENTARIOS QUE DESEA HACER ACERCA DE SU ESTADO DE CIUDADANIA SI UD. NO ES NACIDO EN LOS ESTADOS UNIDOS NI ESTA NATURALIZADO

   _____

   _____

   _____
   SIGNATURE
   FIRMA

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

DECLARATION OF SAN FRANCISCO REGISTRAR OF VOTERS JAY PATTERSON IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, JAY PATTERSON declare as follows:

1. I am the duly appointed Registrar of Voters of the City and County of San Francisco.

2. In April or May of 1982, I met with Arlo Smith, the District Attorney of the City and County of San Francisco, who showed me a letter he had received from United States Attorney Joseph P. Russoniello asking that Mr. Smith obtain from the Registrar of Voters the names and dates of birth of twenty-five persons of new registration whose affidavits of registration reflect (1) a foreign country as place of birth and (2) a preference for election materials in a language other than English. We also agreed upon the manner in which we would respond to that request. The plan, which I thereafter implemented, involved two steps. The first was to select at random affidavits of registration of 35 persons whose affidavits indicated that they were foreign-born, without regard to whether these persons sought, or disclosed a preference for, election materials in a language other than English. The second step was to select at random affidavits of

registration of 35 persons which would be pulled without regard to any selective criteria whatsoever. After the two sets of affidavits of registration were pulled, as described above, I sent copies of them to District Attorney Arlo Smith.

3. I was informed thereafter by Mr. Smith that Mr. Russoniello had requested Mr. Smith to interview three of the persons whose affidavits of registration I had pulled as described above. Mr. Smith asked me to check the records in the Registrar's Office regarding one of these three persons. I discovered from doing so that one had registered in San Francisco in 1979 and had not voted in San Francisco since that time and I so informed Mr. Smith.

4. The information set forth above include all actions I have taken in response to or in connection with Mr. Russoniello's request as described above, except that I received an anonymous note alleging that a certain individual was an illegal alien who had registered to vote and I informed Mr. Smith of the note and of my belief that the note was prompted by the publicity which arose in response to Mr. Russoniello's request for information, as described above.

5. I believe that the actions which I took regarding this matter, as described above, were entirely lawful and reasonable and did not impinge upon any person's rights under the California or United States Constitution or under any other law. The information provided in response to Mr. Russoniello's request is contained in records which by law are available to the public and is of the type which this office makes available for public inspection at all times.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on September 21, 1982 at San Francisco, California.

/s/ JAY PATTERSON

Jay Patterson

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

No. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL., PLAINTIFF,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA, ET AL., DEFENDANTS.

DECLARATION OF JAMES A. RIGGS

I, JAMES A. RIGGS, declare that:

1. I am Registrar of Voters in and for the County of Alameda, State of California.

2. I am personally knowledgeable of the matters stated hereafter except as to those matters with respect to which I am informed and believe them to be true, which information and belief is asserted hereafter as to such matters, where appropriate.

3. I am informed and believe that the Alameda County District Attorney's Office, at the request of the Office of the United States Attorney for the Northern District of California, has commenced, and is conducting an investigation concerning possible irregularities in voter registration affidavits in this county.

4. I have been contacted by the Office of the District Attorney for the County of Alameda concerning the aforementioned investigation. I am informed and believe and on such information and belief assert tnat the nature

of these communications is privileged due to the fact that the District Attorney's criminal investigation is ongoing.

5. It is my belief however that there is nothing illegal or irregular about such an investigation or the manner in which it is being conducted.

Dated:

/s/ JAMES A. RIGGS

James A. Riggs
Registrar of Voters of and for the County of Alameda

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

DECLARATION OF JOSEPH P. RUSSONIELLO

I, JOSEPH P. RUSSONIELLO, declare under penalty of perjury that:

1. I am the United States Attorney for the Northern District of California.

2. I am personally knowledgeable of the matters stated hereafter, except as to those matters with respect to which I am informed and believe them to be true, which information and belief is asserted hereafter as to such matters, where appropriate.

3. On March 16, 1982, I was visited at my office in San Francisco by two persons who had previously asked for an appointment to speak with me concerning the issue of voting rights and the costs being incurred by San Francisco to ensure voting rights in the City and County of San Francisco. My meeting with these people took no more than twenty minutes, during the course of which they left me voluminous materials bearing on this issue requesting that I review them. I agreed to do so and to take whatever action I deemed appropriate, if any, regarding the subject of the meeting.

4. Thereafter, and on a date unknown, but at least within the next seven days, I reviewed the materials these visitors had left with me and, in perusing the materials,

saw a copy of a newspaper article that had appeared in the September 17, 1981 issue of the *San Jose Mercury News* reporting that the District Attorney in Santa Clara County, in cooperation with the Immigration and Naturalization Service, had identified a significant number of persons born either in the Philippines or Mexico who, though registered voters, were ineligible to vote because they were not citizens of the United States. The article further reported that "voter registration clerks said many persons of Hispanic origin register in order to cross easily back and forth from Mexico showing their registration receipts to U.S. Customs officials as evidence that they are U.S. citizens." A true and correct copy of this newspaper article is attached hereto and designated Exhibit A and incorporated herein as if set forth in full.

5. After reading the article, paying particular attention to the claim that non-citizens were registering to vote, I obtained a copy of the voter registration form in common use throughout the Northern District of California and reviewed it. A true and correct copy of the voter registration form is attached hereto, designated Exhibit B and incorporated herein as if set forth in full.

6. I noticed in looking at the form that it provided no opportunity for a person born outside the United States to identify the city of naturalization or the date of naturalization and further that, though it contained an admonition to the person registering that he had to be a U.S. citizen, it nowhere described what the criteria for citizenship were.

7. After reviewing the documents aforestated and at least by April 2, 1982, I requested that preliminary legal research of the Voting Rights Act of 1965 and the 1975 amendments thereto be conducted, including a review of the case law thereunder for the purpose of determining whether there was any federal jurisdiction over persons executing voting registration affidavits who were not entitled to vote by reason of non-citizenship. At the same time I

contacted the District Attorney in Santa Clara County to obtain copies of the investigative reports generated by his office and relating to the subject matter set forth in the newspaper article, Exhibit A herein.

8. On or before April 2, 1982, I personally spoke with District Attorney Louis Bergna, Santa Clara County, who expressed his appreciation that someone else was showing sufficient interest in the matter of possible voter registration fraud to pursue investigation and who promised to send me copies of the investigative reports generated by his office.

9. On April 6, 1982, I received a letter from this same Louis P. Bergna enclosing copies of the investigative reports prepared by his staff and suggesting that I review the matter and then call Ray Cunningham of his staff who personally handled the matter and who would be able to answer any other questions I might have concerning the investigation. Included in the material provided was a copy of a *San Jose Mercury* newspaper article dated March 12, 1982, that I had not previously seen. A true and correct copy of the newspaper article is attached hereto and designated Exhibit C and incorporated as if set forth fully herein.

10. Included among the recommended legislative changes proposed by DA Bergna as reported in the article was that the "registrar of voters should be authorized to seek proof of citizenship from foreign-born voters and be capable of purging the names of those not responding to those demands."

11. At or about the same time as I received a copy of Mr. Bergna's letter aforestated the preliminary legal research I requested was completed, leading me to conclude that federal jurisdiction over primary and general elections for federal offices did exist and that there was federal jurisdiction if irregularities were occurring regarding voter registration and/or voting as those matters related to the June 8 California primary elections.

12. After reviewing the reports from Mr. Bergna's office that were included with his letter to me received April 6th, I spoke personally with Ray Cunningham who informed me that the persons interviewed during the course of the DA's investigation were Hispanic in origin whose primary language was Spanish and that a substantial number of those persons improperly registered were confused at the time of registering to vote by representations made to them by deputy registrars that they *were* entitled to vote because they were either married to U.S. citizens or had lived in the United States for a substantial period of time, without more.

13. Based on the information and reports I reviewed I formed the belief and opinion that the problem of persons registering to vote, though not entitled to register to vote, would arise, if at all, among any group of persons who did not speak or understand the English language. To determine whether such a problem did exist, it seemed reasonable to me that the only way to identify that persons who had recently been registered to vote did not speak or understand English would be to look at the voter registration cards themselves and select from among those persons who had requested voter material and ballots in languages other than English since such a request by them would suggest that a language other than English was their primary language.

14. On the basis of the information provided by Mr. Cunningham and as set forth in the Bergna reports coupled with the inherent defect I perceived in the registration forms, i.e., the failure to provide a place for a person to identify the location and date of naturalization, I directed a letter to the District Attorneys in nine of the fifteen counties within the Northern District of California in which counties the Registrar of Voters was required by the bilingual provisions of the Voting Rights Act to provide ballots and voting materials in Spanish as well as English

and in the case of San Francisco in Chinese and Spanish as well as English. A true and correct copy of the latter, substantially identical copies of which were sent to all affected District Attorneys, is attached hereto and marked Exhibit D and incorporated by reference as if set forth fully herein.

15. My purpose for directing the letter to the District Attorneys was to obtain a random sample of recently registered persons requesting bilingual ballots in their counties so as to determine whether the same high incidence of irregularity and ineligible registration as had been determined existed during the Santa Clara District Attorney's study existed in these other counties as well. It was further by intention as expressed in the letter to pursue criminal prosecution against persons who might thereafter be identified as responsible for fraudulently misleading persons to register. It was not my intention, and it was so expressed in the letter, to pursue criminal prosecution against persons who had registered to vote though not eligible to vote, leaving the option to pursue such cases to the local District Attorneys.

16. Shortly thereafter and at a date unknown to me, it was brought to my attention by Robert Moshorak, an INS agent, that the Spanish language admonition to prospective registrants did not accurately translate the English language admonition that a person "must" be a U.S. citizen. I was informed by Mr. Moshorak and believe and on that basis assert that the Spanish translation is that a person "should" be a U.S. citizen. This discovery tended further to support my suspicion that if irregularities in registration occurred at all those irregularities would occur with more frequent incidence among persons requesting ballot and voting registration material in languages other than English.

17. In response to my letter of April 19, 1982, all nine county District Attorneys to whom the request for a sam-

ple was made responded positively, but in varying degrees to the request.

18. Of the names submitted, a total of 168 were subjected to a federal record check which I am informed and believe and on that basis allege included an examination of FBI civil and criminal fingerprint indices, a hand check of the Immigration and Naturalization records at the San Francisco regional office, and a check of the Immigration and Naturalization Service central computer bank files in Washington, D.C.

19. I am informed and believe and on that basis allege that the examination of the persons whose names were submitted to federal record check disclosed that of the 168 persons, no record existed for 68 of them, 55 were positively identified as citizens, and 45 were either positively identified as not citizens or probably not citizens to a certainty of 90%. A true and correct copy of the schedule reflecting the result of the federal record check is attached hereto and designated Exhibit E and incorporated by reference as if set forth fully herein.

20. I reported the results of the federal record check to each of the affected District Attorneys with a request that they conduct interviews of those persons not positively identified as U.S. citizens.

21. As of this date, only San Mateo County has completed its interviewing and I have reviewed the interview forms used to report the results of those interviews and am informed and believe and on that basis allege that of the 25 persons whose names were submitted as a random sample of persons requesting Spanish language voter registration and ballot information from San Mateo County 15 are citizens, 4 are not citizens, and 6 could not be located and their status is unknown.

22. As of this date I do not contemplate that the U.S. Attorney's office or I will participate in any investigative phase of the matter involving possible voter registration

fraud, but rather that all further investigation will be conducted by the Federal Bureau of Investigation and the Immigration and Naturalization Service in San Francisco with their respective responsibilities and as guided by federal law affording jurisdiction to them, the results of which investigation will be reported in the normal course to the U.S. Attorney for prosecutive opinion and/or prosecution.

Dated: SEPTEMBER 21, 1982.

/s/ JOSEPH P. RUSSONIELLO
Joseph P. Russoniello
United States Attorney

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

DECLARATION OF SAN FRANCISCO DISTRICT ATTORNEY ARLO SMITH IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, ARLO SMITH, de lare as follows:

1. I am the duly elected District Attorney of the City and County of San Francisco.

2. In April of 1982, I received a letter from United States Attorney Joseph P. Russoniello, dated April 19, 1982, in which he asked me to obtain from the Registrar of Voters the names and dates of birth of twenty-five persons of new registration whose affidavits of registration reflect (1) a foreign country as place of birth and (2) a preference for election materials in a language other than English. A letter which is in substance the same that I received is attached as Exhibit A to the Class Action First Amended Complaint for Injunctive and Declaratory Relief re Denial of Civil rights on file herein.

3. After receiving that April 19, 1982 letter from Mr. Russoniello, I discussed Mr. Russoniello's request with Jay Patterson, the Registrar of Voters of the City and County of San Francisco, and we reached an agreement

regarding the manner in which we would respond. We agreed that Mr. Patterson would select at random affidavits or registration of 35 persons whose affidavits indicated that they were foreign-born, without regard to whether these persons sought, or disclosed a preference for, election materials in a language other than English. Mr. Patterson would also select at random affidavits of registration of 35 persons. Those affidavits would be pulled without regard to any selective criteria whatsoever. My intent, which was expressed to Mr. Patterson, was to provide a "control group", so that whatever registration irregularities might be discovered in the foreign-born category could be compared to registration irregularities which might be found in the category of voters selected at random.

4. On May 3, 1982, I wrote Mr. Russoniello and informed him that I had received his April 19, 1982 request and that Mr. Patterson would be forwarding to him a "list of the thirty-five at random foreign born voters and also a list selected at random of thirty-five voters. Hopefully, the latter will put any variances in voter registration among foreign born into proper perspective."

5. On May 6, 1982, I received from Mr. Patterson two sets of copies of 35 affidavits of registration, one of which, I was informed, contained affidavits of registration of 35 foreign born registrants without regard to national origin or language preference, and the second of which contained copies of the "control group" of 35 voters picked at random. On May 12, 1982, I forwarded the copies I had received from Mr. Patterson to Mr. Russoniello.

6. I thereafter received a letter from Mr. Russoniello dates May 26, 1982 in which he asked me to conduct an interview of three persons whose affidavits had been sent to him as described above. Of those three, who were all foreign born, I was informed in that letter that as to the first and second, neither INS nor the FBI had any record

and that as to the third, the person had applied for an Immigrant Visa and Form I-130A and that his residence was at best as a legal permanent resident.

7. I thereafter conferred with Mr. Patterson regarding one of these persons. The records of the Registrar showed that he had registered in San Francisco in 1979 and had not voted in San Francisco since that time. No further inquiry was made of that person. A letter was sent to the remaining two requesting information regarding their citizenship status. Staff learned after telephone calls with these persons that they were naturalized citizens and the date and number of their certificates. The information described in this paragraph was provided to Mr. Russoniello by letter dated June 7, 1982.

8. The information set forth above includes all action I have taken in response to or in connection with Mr. Russoniello's request in his April 19, 1982 letter. I have no plans or intentions to engage in any further follow-up regarding this matter.

9. In my opinion, the actions which I took in response to Mr. Russoniello's request were entirely lawful and reasonable and did not impinge upon any person's rights under the California or United States Constitution or under any other law. The affidavits of registration provided to Mr. Russoniello were public records and therefore entirely appropriate for use in checking out violations of voter registration laws. I further believe Mr. Russoniello's request for such records and for follow-up on them by local agencies in no way violated the lawful rights of plaintiffs in this action or of any other person or persons.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on September 22, 1982 at San Franicsco, California.

/s/ ARLO SMITH

Arlo Smith

0902C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

DECLARATION OF KEITH C. SORENSON

I, KEITH C. SORENSON, declare that:

1. I am the District Attorney for the County of San Mateo, State of California.

2. I am personally knowledgeable of the matters stated hereinafter except as to those matters with respect to which I am informed and believe them to be true, which information and belief are asserted hereafter as to such matters, as appropriate.

3. On or about the 20th day of April, 1982, I received a letter from the United States Attorney for the Northern District of California, Joseph P. Russoniello, requesting that I provide him with a random sampling of 25 names from the voters' lists in San Mateo County, selecting the sample from those voters who had indicated on their affidavits of registration that they were foreign born and had also requested voter material in the Spanish language.

4. Pursuant to the aforesaid request and with the assistance of the San Mateo County Clerk and Registrar of Voters, 25 names were provided to Mr. Russoniello.

5. Thereafter, I received a report from the United States Attorney reflecting the results of federal record checks with reference to the 25 persons aforementioned

indicating that 9 of the 25 were naturalized citizens of the United States of America coupled with a request that the remaining 16 be interviewed in order to ascertain whether or not they were in fact citizens of the United States of America.

6. Pursuant to said request, I directed the Bureau of Investigation of the District Attorney's Office to attempt to comply.

7. Upon completion of said assignment, I provided the results to the United States Attorney's Office as follows: Of the 16 names, 10 were located and interviewed; 6 could not be located. Of those interviewed, 6 provided information convincing me that they were naturalized citizens; 4 stated that they were not citizens of the United States of America but had registered under misapprehensions as to their legal authority to become voters in San Mateo County, California.

8. I advised the San Mateo County Clerk and Registrar of Voters that he should cancel the registrations of those persons found not to be citizens and not allow them to vote at any official elections in San Mateo County.

9. As a result of information obtained from those persons who were non-citizens who registered to vote and declared themselves to be citizens under penalty of perjury, I determined to pursue the investigation further in an effort to ascertain whether any person or person was deliberately attempting to register non-citizens in San Mateo County and urging their participation in elections by fraudulent or misleading representations.

10. In furthering the investigation I decided that all of the remaining names on the voters' lists whose affidavits of registration showed them to be foreign born and requesting voter information in the Spanish language should be checked out in an effort to determine whether evidence existed for possible prosecution, either of the registrants

for perjury or any other person or persons for illegal conduct in urging or aiding ineligible persons to register.

11. The results of the aforesaid follow-up investigation involving 26 names revealed that 16 are naturalized citizens, 5 are not citizens, and 5 were unable to be located.

12. After review and analysis of the findings, I have determined there is insufficient evidence upon which to base a criminal prosecution against any of the persons who are not citizens of the United States of America but nevertheless registered to vote; and I have further determined there is insufficient evidence to prosecute any other person or persons for illegally urging or assisting such persons to register to vote. My investigation is complete; and in the absence of further evidence coming to my attention or information leading to further evidence, I have no intention to initiate any prosecutions arising out of the investigations hereinabove described.

13. In my opinion, based on the information available to Mr. Russoniello, he acted reasonably and responsibly in the performance of his duties as a United States Attorney in initiating the aforementioned investigation; and for District Attorneys to cooperate with him as well as to investigate into the possibility of violations of state law was entirely appropriate and within the course and scope of the obligations and responsibilities of District Attorneys in the State of California.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Redwood City, California, on September 16, 1982.

/s/ KEITH C. SORENSON

Keith C. Sorenson
District Attorney
San Mateo County

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

DECLARATION OF GENE L. TUNNEY, JR.

I, GENE L. TUNNEY, JR., hereby declare as follows:

1. I am, and at all pertinent times was, District Attorney for the County of Sonoma.

2. On or about April 20, 1982, I received a letter from Mr. Joseph P. Russoniello, United States Attorney for the Northern District of California, requesting that I request the Registrar of Voters to submit a random sampling by providing 25 names of voters. This sampling was to be taken from a pool of voters whose affidavits of registration reflected (1) a foreign country as the place of birth, and (2) a preference for election materials in a language other than English.

3. Shortly thereafter, I requested the office of the Registrar of Voters to provide such a sampling directly to the Office of the United States Attorney.

4. I understand that such a sampling was in fact provided.

5. Thereafter, I received a report from Mr. Russionello outlining the status of the determination of citizenship of the sample as per a review of the records of the Immigration and Naturalization Service.

6. I understood that it was left to my discretion as to whether to conduct any further investigation regarding this information.

7. I elected not to conduct any further investigation, because I considered this a matter primarily within the jurisdiction of the Immigration and Naturalization Service. Accordingly, I took no further action in this matter.

8. I believed at the time of these activities, and continue to believe, that there is nothing relating to these activities which even suggested any illegality or impropriety. It is my further understanding that voter registration information is a matter of public record, and required to be provided by the Registrar of Voters upon appropriate request.

Further, I had, and continue to have, no reason to believe that Mr. Russoniello, as United States Attorney for the Northern District of California, would conduct an investigation in an illegal or unconstitutional manner.

9. In my opinion, Mr. Russoniello'a approach to his investigation was reasonable and made effective use of the resources of the various Counties involved. In my opinion there is nothing unreasonable about concentrating investigative resources solely upon those individuals whom preliminary information suggested were voting illegally.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on this 22nd day of September, 1982 at Santa Rosa, California.

/s/ GENE L. TUNNEY, JR.
Gene L. Tunney, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No. C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; ET AL., PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; ET AL., DEFENDANTS.

DECLARATION OF ROSS UNDERWOOD

I, ROSS UNDERWOOD, declare that:

1. I am the Registrar of Voters for the County of Monterey, State of California.

2. I am personally knowledgeable of the matters stated hereafter, except as to those matters with respect to which I am informed and believe them to be true, which information and belief is asserted hereafter as to such matters, where appropriate.

3. On April 21, 1982, John M. Phillips, Assistant Monterey County District Attorney, telephoned me. He explained that William Curtis, the Monterey County District Attorney, had received a letter from Joseph P. Russoniello, the United States Attorney for the Northern District of California, and that Mr. Russoniello was investigating what appeared to be voter registration irregularities in most of the counties in the San Francisco Bay Area, including Monterey County. The investigation had to do with the alleged registration to vote of persons who were actually ineligible to vote because they were not citizens. It was believed that most of these persons would

have requested bilingual ballot materials. Mr. Phillips stated that Mr. Russoniello's letter had requested the District Attorney to assist him by obtaining from me a random sampling of twenty-five (25) newly registered Monterey County voters of foreign birth who had requested elections materials in a language other than English. I explained to Mr. Phillips that in Monterey County, any bilingual ballot materials would be in Spanish only. I told him that the Elections Department would comply since the affected records were public records pursuant to Government Code Section 6250, et seq., and since in addition, there was a specific Government Code Section requiring me to comply with such a request. Mr. Phillips asked that the matter be handled and be kept in strict confidence.

4. Mr. Phillips sent me a memorandum dated April 21, 1982, confirming our telephone conversation and the District Attorney's request. A true and correct copy of that memorandum is attached to this declaration, labelled Exhibit A, and is incorporated herein by reference as though set forth in full.

5. Upon receipt of Mr. Phillips' memorandum, I called a part-time Elections Department employee who works on an as needed basis, and asked her to report for work on the following day. I then looked at the computer reports for the various Monterey County precincts to ascertain which of the precincts had bilingual ballot requests, since about thirty percent of the County's precincts have such requests (although the actual number of bilingual ballot requests vary from precinct to precinct). At random, I then selected twenty-five precincts in which there were bilingual ballot requests.

6. When the part-time clerk reported for work the next day, she was instructed to go to the twenty-five precincts I had randomly selected the preceeding day, and to take the first bilingual registration preference from each precinct.

She was instructed to being at the front on the first precinct, at the middle on the next, and to start from the rear of the next precinct, inasmuch as each precinct file is arranged alphabetically. It was my belief that the best random sampling would be obtained in this manner. The part-time clerk was never informed, either before or afterwards, why she was doing this assigned task.

7. When the part-time clerk had completed her task, the twenty-five Affidavits of Voter Registration were reviewed to be certain that they all met the selection criteria, i.e., a person of foreign birth who had requested bilingual elections materials. In reviewing them, it was found that four of the twenty-five were not foreign born, and so they were withdrawn from the sampling. For the remaining twenty-one, one certified copy was made of each Affidavit of Voter Registration, and then the Affidavit was returned to the precinct file from which it had been pulled. No list of names of precincts was made, and no copy of the Affidavit was retained by the Elections Department.

8. The twenty-one certified copies of Affidavits of Voter Registration were transmitted to the District Attorney's office by normal county messenger service, together with a cover memorandum from Betty Bloomer, Assistant Registrar of Voters, which she prepared at my request and sent to John M. Phillips, Assistant Monterey County District Attorney. A true and correct copy of the transmittal memorandum is attached to this declaration, labelled Exhibit B, and is incorporated herein by reference as though set forth in full.

9. On a date sometime after mid-June, 1982, I was telephoned by Lucille Withers, Monterey County District Attorney Investigator. She stated she had a list of names of registered voters whom she had been asked to interview at the request of the United States Attorney in San Francisco. She did not have addresses for these individuals,

and asked that I provide them. When the names were provided to me, a copy of each Affidavit of Voter Registration was made for her, since the Affidavit had the voter's address on it. The original Affidavit was then returned to the precinct file where it belonged. No copy was made for the Elections Department, nor was any list made or retained which had these names and/or addresses on it.

10. The information provided to the Monterey County District Attorney was information which would have been available to any private person who requested it from the Elections Department, since the records involved are public records pursuant to California Government Code Section 6250, et seq. In addition, California Government Code Section 6263, which provides as follows:

> § 6263 District attorney; inspection or copying of nonexempt public records
>
> A state of local agency shall allow an inspection or copying of any public record or class of public records not exempted by this chapter when requested by a district attorney.

requires that I provide the information requested of me as set forth hereinabove. As set forth herein, I supplied the information requested in such a way as to preserve confidentiality, as I was requested to do by the Assistant District Attorney.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 20, 1982.

ROSS UNDERWOOD

/s/ ROSS UNDERWOOD

Monterey County Registrar of Voters

EXHIBIT "A"

OFFICE OF THE DISTRICT ATTORNEY
MONTEREY COUNTY

Memorandum

TO: Mr. Ross Underwood
Election Department

DATE 4/21/82

FROM: John M. Phillips, Assistant D.A.

SUBJECT:

As I mentioned in our telephone conversation, we are looking into the newly registered persons of foreign birth to determine what percentage of them are in fact eligible to vote. We are requesting, therefore, that you obtain in some random fashion the names and date of birth of 25 persons of new registration whose affidavit of registration reflect (1) a foreign country as a place of birth and (2) a preference for election material in a language other than English. We would request that said names and dates of birth be forwarded to us sometime before April 30, 1982 so that we can in turn forward it to the U.S. Attorney's office.

Again, we are requesting that this matter be kept strictly confidential between us.

ak

EXHIBIT "B"

ELECTION DEPARTMENT
MONTEREY COUNTY

Memorandum

TO: John M. Phillips, Asst. D.A. DATE 4/30/82

FROM: Betty L. Bloomer, Asst. Registrar of Voters

SUBJECT: Attached Copies of Affidavits

Per your request dated 4/21/82, we are forwarding to you Certified Copies of the attached Affidavits of Registration. If We can be of any further assistance, contact our office.

blb

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-82-2102 SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, HISPANIC COALITION FOR HUMAN RIGHTS; CHINESE FOR AFFIRMATIVE ACTION; AND SAN FRANCISCO LATINO VOTER REGISTRATION EDUCATION PROJECT, PLAINTIFFS,

v.

JOSEPH P. RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; WILLIAM A. O'MALLEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR CONTRA COSTA COUNTY; LON UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR CONTRA COSTA COUNTY; ARLO SMITH, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN FRANCISCO COUNTY; JAY PATTERSON, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN FRANCISCO COUNTY; JOHN MEEHAN, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR ALAMEDA COUNTY; JAMES RIGGS, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR ALAMEDA COUNTY; WILLIAM D. CURTIS, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR MONTEREY COUNTY; ROSS UNDERWOOD, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR MONTEREY COUNTY; JAMES D. BOITANO, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR NAPA COUNTY; BARBARA GREENSLAKE, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR NAPA COUNTY;

KEITH SORENSON, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SAN MATEO COUNTY; MARVIN CHURCH, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SAN MATEO COUNTY; ARTHUR DONNER, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CRUZ COUNTY; RICHARD (DICK) NEAL, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CRUZ COUNTY; GENE L. TUNNEY, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SONOMA COUNTY: EEVE LEWIS, INDIVIDUALLY AND IN HER CAPACITY AS REGISTRAR OF VOTERS FOR SONOMA COUNTY; LOUIS BERGNA, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT ATTORNEY FOR SANTA CLARA COUNTY; GEORGE A. MANN, INDIVIDUALLY AND IN HIS CAPACITY AS REGISTRAR OF VOTERS FOR SANTA CLARA COUNTY; DAVID ILCHERT, INDIVIDUALLY AND IN HIS CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE IN THE SAN FRANCISCO BAY AREA, DEFENDANTS.

DECLARATORY OF MARCH FONG EU

I, MARCH FONG EU, declare:

1. I am Secretary of State for the State of California.

2. In the course of business as such Secretary of State, I received and sent the following letters, copies of which are attached hereto and incorporated herein:

DATE	ADDRESSEE	SENDER	EXHIBIT NO.
3/ 3/81	Hon. Louis P. Bergna	March Fong Eu	A
3/11/81	Hon. March Fong Eu	Louis P. Bergna	B
3/18/81	Louis P. Bergna, Esq.	March Eu	C
3/27/81	Honorable March Eu	Louis P. Bergna	D
3/ 8/81	The Hon. March Eu	Louis P. Bergna	E

DATE	ADDRESSEE	SENDER	EXHIBIT NO.
2/23/82	Louis P. Bergna	Ray E. Cunningham	E-1
6/30/81	Louis P. Bergna	Ray E. Cunningham	E-2
3/17/82	Hon. Louis P. Bergna	March Fong Eu	F
5/ 4/82	Joseph Russoniello, Esq.	March Fong Eu	G

3. I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 7, 1982.

/s/ MARCH FONG EU
March Fong Eu

EXHIBIT A

SECRETARY OF STATE
SACRAMENTO 95814

March 3, 1981

Honorable Louis P. Bergna
Santa Clara District Attorney
70 West Hedding Street, West Wing
San Jose, California 95110

Dear Mr. Bergna:

I have read recently the newspaper articles in the San Jose Mercury News regarding alleged voter registration irregularities in Santa Clara County. It is my understanding that your office is investigating these allegations.

I should appreciate your advising me of the status of your investigation as well as your perspective as to the scope of the apparent problem. Based on my experience statewide, there appears to be very little actual voter fraud, although unlawful registrations do arise as a result of confusion or mistake. However, those who do violate the law should be prosecuted promptly and effectively, and I want you to know that my office is prepared to do whatever is appropriate to assist in this regard.

Please let me know if I can be of any assistance.

Sincerely,

/s/ MARCH EU

cc: Mr. George Mann

EXHIBIT B

March 11, 1981

Honorable March Fong Eu
Secretary of State
Sacramento, CA 95814

Dear Secretary of State Eu:

Referring to your letter of March 3, 1981, I'm very sorry but I can't give you any information on our voter registration investigation. We don't comment on our active investigations.

Commenting generally on your inquiry, my attorney assigned to this matter tells me that the entire voter registration and voting procedures are ripe for fraud and should be looked into.

Very truly yours,

LOUIS P. BERGNA
District Attorney

EXHIBIT C

SECRETARY OF STATE
SACRAMENTO 95814

March 18, 1981

Louis P. Bergna, Esq.
District Attorney
County of Santa Clara
70 West Hedding Street
San Jose, California 95110

Dear Mr. Bergna:

Thank you for your letter of March 11, 1981.

I should appreciate your elaborating in detail on your statement that "the entire voter registration and voting procedures are ripe for fraud and should be looked into." Your observations as a prosecutor would be most helpful in terms of determining the necessity for remedial legislation in this area.

Sincerely,

/s/ MARCH EU

EXHIBIT D

March 27, 1981

Honorable March Eu
Secretary of State
Sacramento, CA 95814

Dear Secretary of State:

I would suggest that your question to me in your letter of March 18th be addressed to the County Clerks Association. I'm told that they are the experts in voter registration and voting procedures and have strong feelings as to what safeguards should be provided for in this area.

Frankly, I know very little about this subject but it seems to me that our voting process should be set up so that:

- The persons who register know that that is what they are doing when they sign the card;
- the identity of the person signing the card is reasonably established;
- the person voting is reasonably identified as the person they represent themselves to be.

I'm told that, presently, I could sign registration cards for A, B, C and D, and give my address on each registration card; that a card would be mailed to A, B, C and D by the Registrar of Voters to my address, and if none of the registration cards were returned by the Post Office to the Registrar, no problems would arise. On Election Day, I could vote as A, B, C and D without any problem if the election officers were exceedingly uninterested and unattentive. If they were interested and attentive, I could have others vote for B, C, and D. I, voting as A, and the others

voting as B, C and D, would have nothing to fear as no identification is required and nothing is available at the voting place to check handwriting.

Please accept my interest in this matter as coming from one of those "nuts" who attaches a little sanctity to our voting privilege. Also, please be assured, the hypothetical situations I have given in no way reflect what our investigation has or hasn't revealed.

Sincerely,

LOUIS P. BERGNA
District Attorney

EXHIBIT E

Office of the District Attorney
County Government Center, West Wing
70 West Hedding Street
San Jose, California 95110
County of Santa Clara 275-9651 Area Code 408
California Louis P. Bergna, *District Attorney*

March 8, 1982

The Hon. March Eu
Secretary of State
Sacramento, California 95814

Dear Secretary of State Eu:

As you know, this office has been investigating for over a year allegations of voter fraud in a San Jose City election of 1980.

We enclose a copy of our findings for your consideration and possible reform in the election laws.

It appears to us that these changes are necessary if we are to keep this process as inviolate as possible.

Sincerely,

/s/ LOUIS P. BERGNA
Louis P. Bergna
District Attorney

LPB/jp

Enc.

cc: Dan O'Keefe, States Senate
Alfred Alquist, State Senate
Dominic Cortese, State Assembly
Ernest Konnyu, State Assembly
Alister McAlister, State Assembly
Byron Sher, State Assembly
John Vasconcellos, State Assembly

EXHIBIT "E"
Attachment 1

Memorandum

TO: LOUIS P. BERGNA

DATE February 23, 1982

FROM: RAY E. CUNNINGHAM

SUBJECT: Final Report: VOTER FRAUD INVESTIGATION

On February 8, 1981, the San Jose Mercury News first report that voter registration cards were forged and votes were fraudulently cast in San Jose's 1980 elections.

On February 9, 1981, Voter Registrar George Mann asked our office to investigate. The information on which the first phase of the investigation was based was that there was a conspiracy to illegally register and vote illegal aliens in San Jose City Council District Five.

Between February 17, 1981 and May 29, 1981, D.A. Investigator Robert Mann interviewed 19 individuals and wrote 25 reports, totalling 45 pages.

Attached hereto is a copy of the memorandum I sent you on June 30, 1981, upon the completion of phase one of the investigation, wherein I advised you that we had failed to uncover any evidence of a conspiracy, but were continuing the investigation to deal with the question, which arose during phase one, of large numbers of foreign born voters in District Five who were not citizens but had nonetheless registered, and in some cases, voted.

Certain suggestions were made to you at that time regarding what I felt was the need for legislative reform in this

area. (You and I had previously discussed this issue in March, 1981, and some of the suggestions I made at that time were incorporated in a letter which you sent to Secretary of State, March Fong Eu, dated March 27, 1981.)

To launch the second phase of the investigation, on May 27, 1981, Bob Mann sent a letter to the U.S. Immigration and Naturalization Service, along with a computer print-out list of foreign born registered voters in the City of San Jose's 5th District, requesting a check of their records to determine if they were naturalized citizens.

Six weeks later, the I.N.S. advised us that there would be a charge to process the 714 names. We were advised that the San Francisco Office of the I.N.S. would run a random sampling of one hundred of the 714 names at no charge and a list of one hundred names was sent to them on August 18, 1981.

While awaiting the initial results from I.N.S. Bob Mann completed two loose ends from phase one of the investigation, referred to in my June 30, 1981, memo to you:

1. Addresses where an unusually large number of voters were registered to vote were checked for possible fraud and *no* criminal wrongdoing was found.
2. One isolated case of false affidavit of registration where we identified the perpetrator was investigated. It involved one who registered to vote and voted here in San Jose while a resident of Fremont. After initially claiming that the signatures on the affidavit of registration and at the polling place were not his, despite handwriting analysis to the contrary, I cited into my office. He admitted that he had registered to vote and voted here using his business address since it

made it more convenient for him to do so. I spoke with the Deputy District Attorneys handling Election Code violations in Alameda, San Mateo and San Francisco Counties. (San Francisco had a large number of similar cases involving city employees a few years ago). All counties advised me that their standard procedure in such cases was to advise the individual of the illegality of the conduct and to allow them to cancel their illegal registration without prosecution (provided that the individual had *not also* registered and/or voted in their county of residence). After discussion with Assistant District Attorney Leo Himmelsbach, this was the method of resolution of this matter.

On September 11, 1981, the San Francisco office of the I.N.S. returned our list of one hundred names, advising that there was no record as to eighty, and that of the remaining twenty, eleven were aliens. They cautioned that their files on many people were incomplete or in other district offices, and, further, that as to some of the eight-one [sic] individuals which came us "no record", it may have been the result of insufficient information submitted to them.

In light of these figures, on September 22, 1981, our office sent a check to the I.N.S. in Washington, D.C. to cover the cost of checking, the 714 names through I.N.S. files. While this was being processed, Bob Mann was assigned to locate and interview the eleven persons that the San Francisco I.N.S. office reported were aliens as well as the eighty individuals for which the San Francisco office had found no record.

On December 8, 1981, Bob Mann concluded the laborious process of checking through the ninety-one people. His final tally showed that

69 were U.S. citizens
20 were not U.S. citizens
11 could not be located

These figures suggest that I.N.S. records with respect to the status of aliens in this country are out of date, incomplete and inadequate.

On November 17, 1981, the I.N.S. in Washington, D.C. completed its check of the 714 names submitted to it in September. Bob Mann had already concluded his investigation as to one-hundred of those 714 individuals. As to the remaining 614, the I.N.S. reported that 263 were U.S. citizens and that 351 were either legal permanent residents, illegal aliens, or unable to locate records.

Based upon our previously acquired knowledge of the state of I.N.S. records, we determined that we would contact a random sample of 10 percent of the 351 aliens to determine what percentage were actually U.S. citizens. On December 31, 1981, Bob Mann completed this portion of the investigation. Of thirty persons the I.N.S. reported were aliens, 29 were in fact, U.S. citizens (naturalized).

Insofar as criminal conduct on the part of the aliens who are illegally registered, Elections Code Section 29200 provides that:

> "Every person who willfully causes, procures, or allows himself or any other person to be registered as a voter, knowing that he or that other person is not entitled to registration, is punishable by imprisonment in the state prison for sixteen months or two or three years, or in county jail for not more than one year."

Each of the illegally registered aliens interviewed freely discussed the circumstances of their registration. They were all registered (by their account) either because they believed or were told by the person registering them that they could register because either:

1. They were married to U.S. citizens,
2. They had been residents of the United States for a long period of time.

It is my conclusion, and Mr. Himmelsbach and Chief Assistant District Attorney, William P. Hoffman, concurred in discussions with them, that these cases are not prosecutable because of the requirement of the code section that we prove beyond a reasonable doubt that the person registering must know that he is not entitled to registration. It is not possible to do so in any of the cases investigated, and Bob Mann, Mr. Himmelsbach, and myself, all agree that further investigation would not reveal any prosecutable cases, in light of the code requirement.

Bolstering the defense of the aliens who illegally registered is the fact that we have been aware throughout this investigation that many persons working on registration drives are themselves apparently ignorant of the requirement of citizenship, since numerous ones of them apparently advised the aliens, when told by the alien that they were not citizens, that it was okay to register if they were married to U.S. citizens or had been long time residents.

Prosecution of these individuals conducting the registration would likewise require proof beyond a reasonable doubt that they registered a person knowing that they were not entitled to registration. In addition to this obtacle, we have uncovered the following problems:

1. In 1980 our Registrar of Voters issued 395,377 affidavits of registration. No precise method was

used to keep track of what organization or individual picked up affidavits at the Registrar's Office. Several hundred organizations were engaged in voter registration drives during the 1980 general election. The affidavits were not issued in numbered sequence by the Registrar of Voters, so it is almost impossible to determine what organization picked up a particular block of affidavits. Where it is possible to identify which group registered a particular alien, it is rare that the individual who registered the alien will ever sign the form under the "signature of person assisting (if any)" a space on the form. As a result, we are unable to ever identify, much less interview, the individuals who registered the aliens to find out if any of them registered aliens knowing that they were not entitled to registration.

2. From those few persons who we were able to identify and interview we learned that very little instruction was provided to the volunteers who worked on the registration drives. Additionally, from one particular case, the person conducting the door to door spoke no Spanish and the woman alien being registered spoke little English. The alien registered after (according to her) she told the person she was not a citizen and was assured she could register. The person conducting the door to door registration was not aware she had registered an alien, presumably because she did not understand the woman when she told her, in Spanish, that she was not a citizen.

In summary it is clear that a fairly significant number of aliens not entitled to registration, are registered to vote in Santa Clara County. (Only four of the one-hundred aliens in the first group, and none of the thirty in the second

actually voted.) No prosecutable cases have been uncovered, and, in light of the requirement of the Elections Code referred to above, it is unlikely that further identification and interviewing of names of foreign born voters would uncover any such cases.

It is unclear where responsibility lies to identify the remainder of the illegally registered aliens. The District Attorney's office has no authority to do so where it is not engaged in a criminal investigation, which we have now concluded.

This question is one which the Grand Jury Committee looking into this area should investigate further.

Finally the second phase of this investigation serves only to reinforce the need for legislative reform which I called to your attention at the conclusion of phase one of the investigation. (See June 30, 1981 memorandum attached hereto).

1. A person filling out an affidavit of registration should be required to produce identification and proof of citizenship. (Hence, registration by mail should be abolished).
2. Persons who register the voter (employees of the Registrar of Voter's office or individuals working on voter registration drives) should be required to sign the Affidavit of Registration and indicate their home address.
3. A copy of the signature of each voter (from the Affidavit of Registration) should be provided at the polling place and poll workers should compare the signature of the person at the polls with that of the signature on the Affidavit of Registration. In any event, the poll worker should be required to ask for identification for each voter.
4. The Registrar of Voters needs to be given statutory authority to require proof of citizenship

of already registered voters by sending out requests for same to foreign born voters, and needs authority to purge from the voting rolls the names of persons not responding.

5. The Registrar of Voters should be required to keep, in detail, records of the names and addresses of persons or organizations conducting registration drives. Individuals taking out blocks of Affidavits of Registration should be advised that no affidavit will be accepted unless the name and address of the person who registered the voters appears thereon.

I recommend that these suggestions, and a copy of this memorandum be forwarded to Secretary of State, March Fong Eu, all State Senators and State Assemblymen representing any portion of Santa Clara County, and Registrar of Voters, George Mann.

Should you desire me to draft a cover letter to these individuals to be sent out over your signature, or that of Mr. Himmelsbach, please advise me.

Ray E. Cunningham

REC/em
Attach.

EXHIBIT "E"
Attachment 2

TO: LOUIS P. BERGNA
FROM: RAY E. CUNNINGHAM June 30, 1981

During the past four months Robert Mann has been investigating the alleged instances of forged voter registration cards and fraudulently cast votes uncovered by the San Jose Mercury News. This investigation is basically complete. We have been unable to uncover any evidence that any one person or group of persons conspired to commit violations of the Election laws in this area.

It is apparent that some residents' signatures were forged on voter registration cards. It is also apparent that some voter's signatures were forged at the voting booth. There is no way now to determine who committed these forgeries.

What is clear is the need for legislative reform in this area. In California a person may register to vote in one of three ways: he may pick up a voter registration card at the Post Office and mail it to the Registrar; he may report directly to his local Registrar's office and fill out the voter registration card; or he may fill out a voter's registration card at the numerous neighborhood booths that are utilized during registration drives. The prospective registrant is not required to produce any identification under any of these circumstances.

The Registrar's Office then checks to make sure that the address listed by the registrant is a valid address. If it is, a post card is mailed to the registrant verifying his registration. If the post card is not returned to the Registrar, a sample ballot will be sent to the registered voter, he will be instructed as to where to vote, and his name will appear on the list which is sent to that polling place. The abuses that can occur in this type of a registration system are readily apparent. Consideration should be given to ending regis-

tration by mail, and persons registering at the Registrar's Office or at the voter registration table should be required to produce adequate identification.

The situation is no better at the polling place. The voter comes in, signs his name at the polling place, and is allowed to vote. No identification is asked for and no comparison signature is available for use by poll workers (that is, the poll worker does not have in front of him the signature of the voter from the voter's registration card). Once again, the possibilities for abuse are self-evident, as are the necessary corrective measures.

While the larger part of our investigation is complete, Bob Mann is still checking into possible criminal violations in three areas:

1. One or two isolated cases of false affidavits of registration, where we may be able to identify the perpetrators.
2. A computer list of registered voters in San Jose's Fifth Council District who are foreign born has been sent to the Immigration and Naturalization Service to determine if all registered voters thereon have been naturalized.
3. Addresses where an unusually large number of voters registered to vote are being spot-checked for possible fraud.

As for the major portion of the investigation, which is complete, Elias Castillo of the San Jose Mercury News, who uncovered the fraud, frequently checks for progress reports. If an official statement regarding the outcome of the investigation is called for, please advise me. If anything develops as a result of Mr. Mann's continued inquiries into the three areas I have outlined, I will advise you.

REC/em
CC: William P. Hoffman
Leo F. Himmelsbach
Robert Mann

EXHIBIT "F"

SECRETARY OF STATE
SACRAMENTO 95814

March 17, 1982

Honorable Louis P. Bergna
District Attorney, County of Santa Clara
County Government Center, West Wing
70 West Hedding Street
San Jose, California 95110

Dear Mr. Bergna:

Thank you for sending me a copy of the report on the investigation of allegations of voter fraud in Santa Clara County conducted by your office over the past year. Although I will defer a more comprehensive response to your specific recommendations for changing the mail registration system until I have had the opportunity to confer with other elections officials and legislative leaders, I should like to take this opportunity to respond preliminary to the report.

First, I am pleased that your office did not find any evidence of a conspiracy to register voters fraudulently. My office has investigated allegations of a conspiracy in this regard in the past and has likewise never established any basis for them.

Second, with respect to the one situation wherein a Fremont resident was discovered to have registered and voted in San Jose knowing, apparently, that such conduct was unlawful, I am disappointed that you did not prosecute. Although the disposition of this case may be similar to situations in some other counties, I believe that one of the best deterrents to voter registration fraud and illegal voting

is prompt and certain prosecution to the full extent of the law. If it is not too late to do so, I strongly recommend that this individual be prosecuted without further delay.

Third, I share your concern over what appears to be a significant number of noncitizens who have registered to vote. One noncitizen on the voter registration rolls is one too many. From the report it appears that the problem stems not from any organized effort to knowingly register ineligible persons but rather from ignorance, negligence, or mistake. Thus, in response to an earlier phase of your investigation, I have ordered voter registration forms to be modified by placing a bold bilingual notation in red at the top of the form which says: "For U.S. Citizens Only." I am enclosing a copy of the new form. It is my hope that this notification will alert prospective illegal registrants and persons distributing cards of the requirement that only citizens can register. I am also going to direct county clerks and registrars to give a written notice to all persons requesting significant numbers of cards alerting them to the "citizens only" requirement. Do you think these steps will help solve the problem you have uncovered?

Fourth, I have directed my chief deputy, Anthony Miller, to arrange a meeting with your investigative staff to discuss your findings and recommendations in more detail. I understand that Mr. Miller has already requested a meeting on April 15, 1982.

Fifth, I am very interested in your specific recommendations. Frankly, I have serious doubts whether some of them would accomplish the desired result but they deserve careful consideration and they shall receive it.

I should point out at this point, however, with respect to the suggestion that affidavits of registration should be available at the polling place for signature comparison,

that state law already permits counties, by action of the Board of Supervisors, to provide for such. (Election Code section 14005(p)).

Finally, I want to express my personal appreciation for your efforts in investigating this matter. It is fundamental to our system that the voting process be free beyond any doubt from even the hint of fraud and as Secretary of State I pledge my full support in taking any steps appropriate to ensure that it is.

Sincerely,

/s/ MARCH FONG EU

cc: Mr. George A. Mann, Registrar/Recorder
Honorable Dan O'Keefe, State Senate
Honorable Alfred Alquist, State Senate
Honorable Dominic Cortese, State Assembly
Honorable Ernest Konnyu, State Assembly
Honorable Alister McAlister, State Assembly
Honorable Byron Sher, State Assembly
Honorable John Vasconcellos, State Assembly

EXHIBIT "G"

SECRETARY OF STATE
SACRAMENTO 95814

May 4, 1982

Joseph Russoniello, Esquire
United States Attorney, Northern
District of California
450 Golden Gate Avenue
San Francisco, California 94102

Dear Mr. Russoniello:

As California's Chief Elections Officer, I am deeply concerned that your investigation of a randomly-selected sample of foreign born voter registrants who have indicated a preference for receiving translated elections materials may have a chilling effect on the exercise of our most precious right, the right to vote. Furthermore, to single out registrants of Hispanic and Chinese heritage, as your directive to local elections officers does as a practical matter, raises serious questions of law and policy. For these reasons, I strongly urge your reconsideration of your efforts in this regard.

Your investigation has the obvious and reasonably certain effect of discouraging naturalized citizens from registering to vote for fear of triggering a federal investigation which could prove to be an embarrassment and invasion of privacy. Such a concern is not unfounded, of course, given the notorious unreliability of INS data. It is highly probable that you will end up investigating naturalized citizens. No citizen should have to fear the possibility of a local or federal prosecutor calling his or her employer, landlord or friends for information just because the citizen has exercised a fundamental constitutional right.

I am aware, of course, of recent findings in Santa Clara County that a significant number of non-citizens have registered to vote there although very few have actually voted. That investigation also indicated that such registrations were the result of misinformation and ignorance rather than a conspiracy to defraud the electoral system in California.

In response to that investigation, I have ordered that all voter registration cards be prominently captioned in red with the warning that the cards are for the use of United States citizens only. The caption will be translated on forms used in counties covered by the Voting Rights Act. I am also taking steps to educate voter registration card distributors and the public generally that only United States citizens can register and vote. Furthermore, I am making it a point to advise the public of the severe penalties which could result from fraudulent registration or voting.

I think the educational approach I am taking, coupled with swift and certain prosecution of violators, is a more appropriate response to the legitimate concern over non-citizens registering to vote than your discriminatory investigation that discourages lawful registrations. I urge you to join me in this approach and to make it clear to everyone that all citizens, native or foreign born, have the right to register and to vote and will not be harrassed because they have chosen to excercise it.

Sincerely,

/s/ MARCH FONG EU

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

_ Civil Action No.
C-82-2102-SW

JOSE J. OLAGUES, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; ET AL., PLANTIFFS

v.

JOSEPH RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; ET AL., DEFENDANTS.

DECLARATION OF LILIA ISABEL MEDINA

I, LILIA ISABEL MEDINA, do state

1. My name is Lilia Isabel Medina. I live at 1640 Walnut St. Apt. B, Berkeley, California, 94709. My phone number is 548-3207.

2. I arrived in the United States on April 22, 1959, from Havana, Cuba. I was accompanied by my mother and brother. Our arrival point was Key West, Florida, on a regularly scheduled carrier. We arrived as resident aliens not as travel tourists.

3. I continued to reside in Florida until 1965, when I moved with my family to New Orleans. On January 7, 1970, when I was seventeen, I was naturalized in the Eastern District federal court of Louisiana, at the same time as my mother and father. A copy of my naturalization papers is attached as a copy.

4. I then moved to San Francisco in March of 1975, and voted, as a registered voter, in all regularly scheduled city and county elections until 1981. In June of 1981 I moved to Berkeley. I registered to vote in Berkeley at the Shattuck Avenue Co-op. There was a table outside. I requested

election materials in Spanish, as I have done in the past. I did not know who was working the table.

5. My strong feelings are that given the very large number of non-English speaking citizens, there is a need for election material in Spanish and Chinese, for this makes our legal right to vote possible for those who can't vote with English ballots.

6. Two weeks after the primary in June 1982, I received a notice in the mail to pick up certified mail at the Berkeley main post office. As I opened the certified letter, I was astounded to read that the U.S. Attorney had informed the Alameda county district attorney that no records could be found to reflect my immigration of citizenship status. I then recollected the investigation by the U.S. attorney of those who had requested bilingual ballot materials.

7. I was indignant because I had been voting since 1975 in San Francisco, and had never had any problems. I immediately called the person mentioned in the letter, Mrs. Davis, who works in the Alameda county District Attorney's office. In Spanish I asked her what kind of identification would be required to prove citizenship, because the questionnaire attached to the letter asked that question.

8. Mrs. Davis in Spanish said it was whatever number could be found on my citizenship paper. I then asked her who initiated the investigation, and she said she thought it was the FBI. Then she qualified her answer by saying that the D.A.'s office had an obligation to follow up on the investigation, leading me to believe that I had to respond, and that I would be in the wrong, or subject to some penalty if I didn't cooperate.

9. She did say that I had the right to vote if I was a citizen and it was in keeping for me to ask questions regarding the investigation. That was the end of the phone call.

10. I was aware that this investigation is only being conducted on persons who are of foreign birth and who had requested bilingual ballots. I believe this investigation is unfair since they had no reason to ever believe that I was illegally registered to vote.

11. In October of this year I was contacted by F.B.I. agent Wyneken who requested that I contact his office. Since I believed that he wanted me to answer questions regarding my right to vote and who registered me to vote, I then contacted the Mexican-American Legal Defense and Educational Fund for assistance, and I have supplied the attached affidavit so that I will not be investigated any further.

I declare under any penalty of perjury that he [sic] foregoing is true and correct, and if I am called as a witness I will competently testify thereto.

Executed in the City of Berkeley, County of Alameda, State of California.

11-12-82	/s/ LILIA ISABEL MEDINA
Date	Lilia Isabel Medina

UNITED STATES OF AMERICA

No. 9267487

PETITION FOR NATURALIZATION

NATURALIZATION COURT

Petition No. 20561

Alien Registration No. A11 861 913

·ORIGINAL·

Personal description of holder as of date of naturalization: Date of birth August 23, 1952; sex Female; complexion Medium; color of eyes Brown; color of hair Dk. Brown; height 5 feet 3 inches; weight 119 pounds; visible distinctive marks None; Marital status Single; Country of former nationality Cuba

I certify that the description above given is true, and that the photograph affixed hereto is a likeness of me.

Seal

Lilia Isabel Medina

(Complete and true signature of holder)

U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA } ss:

Be it known that at a term of the U.S. DISTRICT Court of EASTERN DISTRICT OF LOUISIANA NEW ORLEANS DIVISION held pursuant to law at New Orleans, Louisiana on January 7, 1970 the Court having found that LILIA ISABEL MEDINA then residing at 11 Billyday Ave. Kenner, La. 70062 intends to reside permanently in the United States (when so required by the Naturalization Laws of the United States), had in all other respects complied with the applicable provisions of such naturalization laws, and was entitled to be admitted to citizenship, thereupon ordered that such person be and (s)he was admitted as a citizen of the United States of America.

In testimony whereof the seal of the court is hereunto affixed this 7th day of January in the year of our Lord nineteen hundred and seventy.

Clerk of the U.S. DISTRICT Court.

By _____ Deputy Clerk.

IT IS A VIOLATION OF THE U. S. CODE (AND PUNISHABLE AS SUCH) TO COPY, PRINT, PHOTOGRAPH, OR OTHERWISE ILLEGALLY USE THIS CERTIFICATE.

DEPARTMENT OF JUSTICE

Change of name by order of the Court
From: LILIA MEDINA
To: LILIA ISABEL MEDINA

BENJAMIN W. REISCH, CLERK

January 7, 1970
New Orleans, La.

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil Action No.
C-82-2102-SW

JOSE J. OLAGUES ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED; ET AL., PLANTIFFS

v.

JOSEPH RUSSONIELLO, INDIVIDUALLY, AND IN HIS CAPACITY AS UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA; ET AL., DEFENDANTS.

DECLARATION OF MARIA GLORIA RODRIGUEZ

I, Maria Gloria Rodriguez, declare:

1. My name is Maria Gloria Rodriquez. I am a resident of Contra Costa County since 1980. I am living at 3113 Valley Vista Road in the City of Walnut Creek. Previous to that I lived in South San Francisco in San Mateo County from 1959 to 1980.

2. I am presently employed as a escrow officer at Chicago Title Insurance and Trust Company at 221 Pine Street, 2nd Floor San Francisco, California.

3. I was born in Guatemala and emigrated to the United States as a resident alien in 1955. On November 21, 1967 I became a naturalized United States citizen.

4. Soon after 1967 I registered to vote and have voted in local, state and federal elections.

5. I take my right to vote seriously and when I lived in San Mateo County I worked with the League of Women Voters to assist and encourage individuals to vote.

6. Some of the work I did with the League of Women Voters was to translate election materials from English to

Spanish and to appear on television to explain, in Spanish, about the issues that would be coming up at election time.

7. I began to request bilingual election materials as soon as they were made available to the public. Although I speak, read, and write English fluently, I requested election materials in Spanish to insure that they had been translated properly and to explain election issues to my mother so she can vote with better knowledge. My mother is also a United States citizen.

8. In addition to writing with the League of Women Voters, I also worked as a deputy registrar of voters in San Mateo County.

9. I had been aware that the United States Attorney was conducting an investigation of people who had requested bilingual voter materials because a friend of mine in San Mateo, who also was a deputy registrar of voters, had called me to tell me that people's names were being selected at randōm for investigation. My friend told me the only reason they were being investigated was because they had requested bilingual election materials.

10. During the past week, a person active in Hispanic community affairs in Contra Costa county called me at my home at 7 p.m. to inform me that he had found out that I had been selected for investigation by government authorities.

11. I do not get scared very easily but when I received this call and was told that a secret investigation was going on about my qualifications to vote, I was very upset and bothered.

12. The best way I can describe my feelings is to say that it feels like the government is doing an investigation behind my back, as if I were an accused drug pusher, without knowing what the charges are against me. It seems to me that they are doing a secret investigation to find out if I committed a crime and then having someone else call me to say they found out I was on a "hit list".

13. I am also very upset that this investigation is only being done on a selected group of people simply because they chose to use election materials which, by law, they are allowed to use. I feel this is discrimination.

14. I know, from being a deputy registrar of voters, that people know that you need to be a United States Citizen to vote and I have never registered or met anyone who might have improperly registered.

15. I also know that many people who request election materials in Spanish are sometimes reluctant to request bilingual election materials because they feel that when they vote that people may have doubts as to their voter qualifications or doubt that they speak English.

16. Finally, I myself refuse to be intimidated by these disciminatory tactics, but in my experience as a deputy registrar, I believe that many people will be discouraged from voting or using election materials because they may be the target of such secret investigations.

I declare under penalty of perjury that the foregoing is true and correct and was executed in San Francisco, California.

5-20-82	/s/ MARIA GLORIA RODRIGUEZ
Date	Maria Gloria Rodriquez

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NO. C-82-2102-SW

JOSE J. OLAGUES, ET AL., PLANTIFFS,

v.

JOSEPH P. RUSSONIELLO, ET AL., DEFENDANTS.

SUPPLEMENTAL DECLARATION OF JOSPEH P. RUSSONIELLO

I, JOSEPH P. RUSSONIELLO, declare under penalty of perjury that:

1. I am the United States Attorney for the Northern District of California;

2. On June 3, 1982, I recieved the attached letter from the Office of March Fong Eu, signed by Anthony L. Miller, Chief Deputy Secretary of State for the State of California. Enclosed with that letter was the attached press release of March Fong Eu, dated May 28, 1982.

DATED: December 6, 1982.

/s/ JOSEPH P. RUSSONIELLO

Joseph P. Russoniello
United States Attorney

OFFICE OF THE
SECRETARY OF STATE
March Fong Eu
Executive Office
1230 J. Street
Sacramento, California 95814

June 1, 1982

Joseph Russoniello, Esquire
United States Attorney, Northern District
450 Golden Gate Avenue
San Francisco, California 94102

Dear Mr. Russoniello:

I should like to take this opportunity to thank you for your assistance in providing me with the relevant information concerning your ongoing investigation of unlawful voter registrations. As I indicated to you, Secretary of State Eu is very interested in your findings and in seeking solutions to preclude such registrations in the future. I am enclosing a copy of a press release which she issued in response to the investigation by your office.

We are particularly interested in how many of the ineligible registrants have actually voted in a prior election. The dates of registration would also be of interest. The circumstances of the registrations, as determined by follow-up interviews, would be particularly valuable.

Incidentally, your understanding as to the ambiguity of the Spanish translation of the requirements of U.S. citizenship in the instructions printed on the card appears to be correct, although that conclusion is not a unanimous one. In any case, the Secretary of State has ordered that subsequent printings of the cards be changed to make the mandatory requirement of citizenship clearer.

We are also exploring the possibility of describing in some fashion what is meant by U.S. citizenship in the instructions and perhaps changing the form to specifically require the registrant to answer "yes" or "no" as to citizenship rather than including the statement as part of the "perjury" declaration.

Thank you again for your cooperation in this regard.

Sincerely,

/s/ ANTHONY L. MILLER

Anthony L. Miller
Chief Deputy Secretary of State

ALM:bp
Enclosure

NEWS RELEASE

from: Secretary of State March Fong Eu
1230 J Street, Sacramento, CA 95814
(916) 445-6371

For Immediate Release — Contact: Caren Daniels

May 28, 1982

SECRETARY OF STATE EU SPEAKS OUT ON ILLEGAL VOTER REGISTRATION

SACRAMENTO—Secretary of State March Fong Eu today (May 28) called for the vigorous prosecution of violators of California's voter registration laws in the wake of an investigation indicating that a number of non-U.S. citizens have registered to vote in California. She also renewed her call to the Legislature to outlaw payments to voter registration card distributors in some cases and announced a number of other steps to prevent non-U.S. citizens from registering to vote.

"I am again calling on the Legislature to enact laws outlawing payments to card distributors based on the number of registrations turned in," Ms. Eu said. "I am afraid that greed may have induced a number of overzealous registration card distributors to ignore stringent voter registration requirements in an effort to make an extra buck by collecting as many completed registration affidavits as possible."

Ms. Eu also said she has expressly ordered all registrars of voters to provide specific written instructions to registration card distributors to advise registrants that only U.S. citizens can register to vote.

The secretary of state is also exploring the possibility of providing more information on the voter registration card itself further explaining the requirements of U.S.

citizenship to be eligible to register and vote. Earlier this year, Ms. Eu ordered that all voter registration cards used in California be captioned in the appropriate languages with a warning printed in red bold letters stating that cards can be used only by U.S. citizens.

Ms. Eu said, "One non-U.S. citizen on California voter rolls is one too many. I am renewing my call to district attorneys and other law enforcement officials to vigorously prosecute and send to jail anyone who violates our registration and voting laws. This is serious business, and violators must be dealt with accordingly."

The investigations referred to by Ms. Eu include one conducted by the Santa Clara County District Attorney, and a subsequent study of foreign-born registered voters requesting bilingual election materials conducted by the U.S. Attorney in San Francisco, Joseph Russoniello. The Santa Clara investigation found twenty apparent illegal aliens registered to vote, and the U.S. Attorney's investigation indicated that out of 100 identifiable subjects, 55 were naturalized citizens (and eligible to vote), 6 were illegal aliens (ineligible), 19 had permanent resident immigration status, and 20 were presumably non-U.S. citizens. The U.S. Attorney and/or districts attorneys for the eight counties involved in the probe (Alameda, Contra Costa, San Mateo, Santa Clara, Monterey, Napa, San Francisco, and Sonoma) will now interview the suspected illegal registrants in an effort to determine why they registered to vote. Investigators have indicated the absence of any evidence of a conspiracy to induce non-citizens to register and vote or widespread deliberate efforts to violate the registration laws by registrants.

Ms. Eu has offered the full staff resources of her office to do whatever ultimately is required to see that widespread illegal voter registration does not occur, while still not discouraging those persons legally entitled to register from registering and voting.

ELECTIONS

Forgery at the polls: Loose voting laws draw fire

REGISTRATION

Elias Castillo
Mercury News Staff Writer

FEB 8 1981

Voter-registration cards were forged and ... were fraudulently cast in San Jose's 1980 ..., a spot-check by the Mercury News dis-

11/12

County Registrar George Mann, who is responsible for keeping track of Santa Clara County's more than 613,000 voters, said state voting laws are loose enough to allow widespread fraud. However, his office has not investigated possible fraud during registration and voting in June and November elections.

The Mercury News spot-check of two of the city's 10 city council districts disclosed evidence of:

- Forgery of one voter's signature at the voting booth.
- Forgery of residents' signatures on voter registration cards.
- Registration of aliens who were ineligible to vote. Two of those ineligible voters also cast ballots. Under federal law, only United States citizens are allowed to vote or register to vote.

Six cases in which persons registered to vote were not found at the addresses listed on their registration cards. Voters are required by law to advise the county registrar of voters of changes in their home addresses.

Robert Webb, deputy district attorney, said his office was prepared to investigate. He, too, was critical of current laws.

"Anyone can register anyone. I can see how that could lead to mistakes, if not fraud," he said.

Voting violations under state law can be considered felonies, punishable by fines and imprisonment.

The examples of forgery were uncovered in precinct 1733 of District 5 (Alum Rock) and precinct 1536 of District 3 in the city's west side.

Signatures to cast ballots

Inez Naranjo

Mary A. Canzoneri

Signatures on voter-registration cards

Inez S. Naranjo

Mary Canzoneri

Lowell Bradford, former head of the Santa Clara County crime lab, was hired by the Mercury News to examine signatures. He verified the forgeries.

One of the forged signatures in District 5 was that of Inez S. Naranjo, 75, whose voter-registration card lists her address as 2525 Foxdale Drive.

The signature on the registration card is different from the signature appearing on the voter roster. The voter-registration card verifies that the person signing it is eligible to vote. The voters' roster contains signatures of those persons who voted at a precinct voting booth.

Bradford, in examining Naranjo's registration card, said the signature on the voter roster "is written by a person different from the person signing the voter registration."

Naranjo, who is staying with a relative in Kingsville, Texas, said she was uncertain whether she had voted in November. "I can't remember, but I think I did," she said in a telephone interview.

She did not explain why her signature on the registration form was different from the one on the voting roster.

Continued on Page 11

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Forged voter-registration cards found in spot-check of elections

MN SUN FEB 8 1981

Continued from Page 1B

A signature in Precinct 1536 of District 2 stood out as an apparent forgery. It was that of an elderly woman, Mary Campos, who moved from San Jose to Sacramento in October. Campos formerly lived at Coburn's Delmas Avenue Rest Home, 945 Delmas Ave.

Campos' signature appeared on an absentee ballot, one of six mailed from that address. Bradford concluded that three signatures, including that of Campos and two other residents, those of Allene Ivy and Rosa Watts, were written by one person.

Martin T. Coburn, owner of the facility, said Watts is 85 years old and Ivy is blind. He said he signed to "help them out."

However, he denied signing for Campos. "I don't know what happened, but that's not my handwriting," Coburn said.

Under state law it is illegal to sign for another person who is using an absentee ballot unless the voter is incapacitated. In that case, a special affidavit is used to explain the circumstances. The special affidavit was not used in the absentee ballots sent from Coburn's rest home.

Illegally registered voters also were discovered during a check of hundreds of registration cards. Thirty-four registered voters whose affidavits listed them as being born outside the United States were picked to determine whether they were eligible to vote.

A check of U.S. Immigration and Naturalization Service records showed none of the registrants was a U.S. citizen.

Manuel Antonio Alfaro, a patient at El Dorado Guidance Center, 101 Jose Figueres Ave., registered to vote in District 5. But he is not a U.S. citizen.

Alfaro said a former nurse at the center asked him to fill out the voter-registration card. He said the nurse had not explained to him what he was signing. Alfaro said the nurse left the facility after the November election.

"I didn't know what it was. He just asked me to fill it out and I did," said Alfaro, an El Salvadoran.

He recalled being taken by center personnel to vote at a nearby poll on November.

The center's administrator, Adele Vernon, said the center normally allows all its patients to register and vote. "We provide the cards and what they put on them is their personal business," she said. "We have no way of telling whether they are eligible to vote."

Antonio Aguilar registered to vote in 1976 but did not realize what he had done until a reporter explained the registration process to him. Aguilar is a permanent resident alien and ineligible to vote.

He said the person who registered him at a shopping center told him he was signing a petition, not a registration card.

"I don't read very well and the person who asked me to register said my signature would help improve the welfare system in the county, so I signed," Aguilar said. "Now I know she lied to me."

Aguilar said he was surprised when he began receiving voting material. "I'm a permanent resident alien and I know I can't vote, so I would just throw away the material," he said.

Also among the ineligible registered voters in District 5 were two 18-year-old women who immigrated from Panama and Mexico. The parents of the two said the women had registered to vote because they mistakenly thought they became U.S. citizens when their mothers were granted U.S. citizenship several years ago.

Jose Mendoza, another registered voter who is not a U.S. citizen, said he and his wife had signed the registration cards because "we heard all sorts of radio commercials in Spanish urging people to vote."

Mendoza appeared surprised when told it was illegal for aliens to sign such a card. "I didn't know that. I can't read English or Spanish because I never went to school. Why didn't the radio commercials say you had to be a U.S. citizen to sign them?" he asked in Spanish.

Mendoza said he and his wife registered by picking up cards at an East Side shopping center.

Mann said many of the public-service commercials and placards distributed by his office do not explain that persons must be 18 years old or older and U.S. citizens before they can register to vote.

Dora Gonzales, 288 S. King Road, appeared stunned when asked by a reporter to verify her signature with voter-registration records. "I've never registered to vote. I'm not a citizen and I know I'm not supposed to vote. Somebody must have taken my name and put it on that card," she said.

Richard Gomez, community relations director of Jobs for Progress Inc., also appeared surprised when told there was a voters' registration card listing him as living at 1680 Santa Clara St. The address is that of the American GI Forum, a Hispanic veterans' organization. Gomez is former executive secretary of the GI Forum in San Jose.

When shown a copy of the card that included a signature, Gomez shook his head and said, "I didn't fill out that card. I moved to Fremont in 1977 and haven't voted in Santa Clara County since then. I didn't even vote in the last election because I didn't like any of the candidates."

Abel Cota, executive director of San Jose GI Forum Community Services, which occupies the Santa Clara Street address, said he had no idea who could have filled out the card and placed Gomez's name on it.

Cota said that while the GI Forum signed up 1,600 voters last spring, he did not believe any of the volunteer registrars would have filled out a phony card.

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Immigration — San Jose Mercury Sept 17, 1981

D.A. checks if aliens vote in San Jose

NEWS THU SEP 17 1981

P1B

Of 100 names submitted, only 20 on naturalization records

By Elias Castillo
Staff Writer

The U.S. Immigration and Naturalization Service says it has no records to show that scores of foreign-born registered voters in San Jose ever became U.S. citizens and thus eligible to vote.

A check into the eligibility of the voters was made at the request of the Santa Clara County District Attorney's Office as part of its investigation into illegal voter registration in San Jose.

INS records are incomplete, an official with the agency acknowledged. But if the records are correct in this case, they indicate that scores, and perhaps hundreds, of residents are illegally registering to vote.

"It doesn't look good at all," said George Mann, county registrar of voters. "If it's that bad, it deserves some action."

Assistant District Attorney Leo Himmelsbach said the office plans to conduct door-to-door checks to find out whether the people on the INS list are citizens and whether they voted.

The INS keeps records of resident aliens, naturalized citizens and aliens who have been caught trying to come into the country illegally.

Of 100 names submitted by the District Attorney's Office, the INS found only 20 on its records. Of those, eight were naturalized citizens and therefore eligible to vote.

The names were selected from a larger list of 850 foreign-born voters compiled by the District Attorney's Office.

Himmelsbach said that the sample of 100 is [illegible] county could have [illegible] registered [illegible] fraudulently [illegible]

Himmelsbach is heading the investigation, which was started in February by District Attorney Lowell P. Bergman.

The investigation has found no evidence so far that illegally registered voters influenced the outcome of any elections in the county, the District Attorney's Office said.

Under federal law, only U.S. citizens are allowed to vote. And it is a felony for voters to give false information when they register. A voter can only register after signing an affidavit declaring that he or she is a U.S. citizen.

Voter-registration clerks said many persons of Hispanic origin register in order to cross easily back and forth from Mexico, showing their registration receipts to U.S. Customs officials as evidence that they are U.S. citizens.

Of the 12 people found ineligible to vote, four cast ballots in the November election, a Mercury check of voting records shows.

The absence of entry records for the 80 could mean they illegally entered the United States, an INS official said, but that may not necessarily be the case for some of the names.

The official said INS records, especially those for older people, may be incomplete, but tend to be more accurate for younger people, especially those in their early 20s and 30s.

The District Attorney's Office has said that is one of the reasons the names of foreign-born people in that age group were selected for the INS check.

The majority of those listed by the District Attorney's Office named either the Philippines or Mexico as their birthplace.

Continued on [illegible]

NEWS THU SEP 17 1981

D.A. checks if aliens vote in S.J.

Continued from Page 1B

P3B

voter registration cards. (People registering to vote are required to identify their place of birth on the card.)

San Jose City Councilwoman Blanca Alvarado, from whose 5th District the names were selected, criticized the District Attorney's Office for limiting the investigation only to her district.

"It puts us into a position of scrutiny that almost accuses us of wrongdoing, where illegalities may also have occurred in other districts," she said.

Alvarado said some of the people found to be ineligible to vote "may have gotten caught up in the excitement of last year's political campaign" and registered to vote without full knowledge of voter-registration requirements.

Bergman said he had ordered the investigation on the 5th District because of a Mercury report earlier this year that found voter-registration irregularities in that district.

Himmelsbach said the list of 100 names submitted to the INS for verification was representative of foreign-born voters in the 5th District, which covers most of San Jose's East Side.

The check will involve finding the registered voters on the list and asking for proof that they are U.S. citizens.

Himmelsbach said it was possible that overzeal campaign workers could register poorly educated foreign-born residents without explaining the voting process and its requirements.

The new data will help the district attorney's investigation into voter fraud in the county, he said.

"Now we have something we can get a handle on," Himmelsbach said. He was referring to the failure of the District Attorney's Office so far to get substantial data for its longstanding investigation.

Originally, the District Attorney's Office had sought to have the INS in Washington, D.C., check 850 names, but balked when the federal agency said it would charge $1,836 for the service.

Instead of having all 850 names checked, 100 names were selected on a spot basis from the larger number. The 100 names were to provide a clue as to whether there were large numbers of people whose status as registered voters was questionable.

Himmelsbach said the District Attorney's Office will decide whether to have the INS check the other 750 names after finding out how many people in the sample turn out to be illegally registered voters.

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000001

San Jose Mercury ■ Friday, March [illegible]

D.A. wants state to stop voter registration by mail

By Elise Ca[illegible]
Staff Writer

District Attorney Louis Bergna of Santa Clara County [illegible] called for legislation to halt mail registration of voters and to overhaul the state's voting process, a system he blasted [illegible] being "ripe for fraud."

The proposals are part of a six-page report outlining the results of a yearlong investigation [illegible] alleged voter fraud in Santa Clara County. Copies have been sent to the area's state legislators.

Among the proposed legislative changes:

✓ Eliminate the use of registering voters by mail. Under [illegible] registration, Californians can register to vote by simply filling out a card attesting that they are U.S. citizens and are 18 years old.

✓ Anyone registering to vote should be required to prove he is a U.S. citizen.

✓ Anyone registering voters should be required to sign the affidavit of registration and provide a home address.

✓ Copies of voters' signatures should be available at the polls to allow comparison of signatures between the person voting and the actual registrant.

✓ The registrar of voters should be authorized to seek proof of citizenship from foreign-born voters and be capable of purging the names of those not responding to these demands.

✓ Accurate record-keeping of people or organizations that pick up material for voter-registration cards should be enforced. Currently, anyone can pick up dozens of voter-registration cards by giving only his name or the name of the organization and how the cards will be used.

Tom Miller, chief deputy for the secretary of state's office, criticized the proposals, saying they penalize all the voters for the abuse of a few. The secretary of state is responsible for overseeing the voting process throughout the state.

Miller said the state stopped comparing voter signatures in the 1970s because "it was too expensive" and imposed an unnecessary workload on poll keepers who are not "handwriting experts."

He said the proposal requiring foreign-born voters to prove their citizenship is "unconstitutional."

The current attitude toward the voter-registration process, Miller said, "is that the system is safe, but that it is subject to abuse that is minor. To root out that minor abuse would inconvenience and disenfranchise a large percentage of those eligible to vote by imposing strict requirements on identification or proof of citizenship.

"A lot of persons with names like Martinez or Choy would be kept from the polls with these restrictions," Miller said.

George Mann, Santa Clara County registrar of voters, would not comment on the report, other than to say that he disagreed with ending mail registration.

Santa Clara County had 602,880 registered voters as of Nov. 4, 1981.

The voter-fraud probe was begun in February 1981, after reports surfaced of ineligible people voting in San Jose's 8th City Council District. A random list of 125 names of foreign-born voters was investigated, during which it was learned that 28 ineligible aliens had registered to vote.

The alien voters said the people registering them told them they were eligible because they either were married to a U.S. citizen or had lived residents of this country for a long time. Under federal law, neither reason qualifies a person to register.

Investigators said finding 28 errant voters in the random sampling indicates the presence of a larger number of ineligible voters. However, they said there was no way of determining that number without requiring all foreign-born voters to prove their citizenship.

Suicide try called 'act of love'

Lawyer gives explanation for Singer's overdose

By Kathe[illegible] Eli[illegible]
Staff Writer

Convicted murderer Robert Howard Singer took an overdose of pills late last month "as an act of love for his wife and for his family," Singer's attorney told a judge Wednesday.

The attorney, William Melcher, said Singer wanted to [illegible] newspaper publicity after his conviction Feb. 1 because it encumbered on him . . . to execute himself, removing himself from the scene. . . . He didn't want to be [illegible]."

The 47-year-old Michigan restaurateur faces a possible death sentence in the contract killing of his wife's lover, Richard Wilkin. The victim was shot to death at his front door in Santa Clara on March 31, 1980, [illegible] Andrew Granger, who was convicted [illegible] last summer.

Jurors [illegible] hearing evidence Wednesday in the [illegible] which they will enter in the case, said he would call no witnesses in the penalty phase because he could find no evidence of prior crimes or other aggravating facts in Singer's case.

Singer has denied any involvement in the murder of Wilkin, and he repeated that denial Wednesday. Speaking hoarsely and wearing a wrinkled gray suit, Singer began his testimony by recounting hardships he has suffered, including years of hard work, number of serious back operations, and a first wife who he said had become emotionally ill early in the marriage and whom he later divorced.

After the back operations, Singer said he was walking was impaired for years.

"Many people say I should be very grateful (for regaining the ability to walk)," Singer said, looking upward. "I say, . . . 'Bull—.' I went through a lot."

Mtn. View dumps garbage contract

By Diane Curtis
Staff Writer

Mountain View has turned up its nose at $9 million worth of San Francisco garbage, preferring instead to consider transforming the North Bayshore garbage dump into much-needed housing sites.

And San Francisco officials are left with the task of finding a new dump site. "Obviously, we're disappointed," Dennis Bossy, executive assistant to San Francisco's chief administrative officer, said Wednesday.

The Mountain View City Council voted 4-3 Tuesday night to deny a two-year extension of a garbage-dumping contract with San Francisco that expires in 1983.

San Francisco had made two offers. One was to pay Mountain View $5.4 million to dump 1.1 million tons of garbage at the landfill adjacent to Shoreline Park and at the Ferrari Landfill on Stierlin Road. The second offer would have brought in $9 million from San Francisco for allowing the city to dump all its garbage at the Shoreline Park site.

Council members instead decided to spend between $75,000 and $125,000 to study the possibility of building housing at the Shoreline Park site.

Voting to turn down the San Francisco garbage contract to proceed with the housing study were council members Dick Wesmuth, attending his last council meeting; Pat Figueroa; Barbara Packard; and Lee Nichols. Opposed were Mayor Marilyn Peterson and council members Angela Francisco and Matt Allen.

Planning Director Glen Cauthry said the study would take at least nine months.

A previous study on property for housing on the landfill indicated homes would not be safe during earthquakes and floo-

SAN JOSE
MILPITAS

Exhibit C
800008

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In the Supreme Court of the United States

No. 86-1217

JOSEPH P. RUSSONIELLO, ET AL., PETITIONERS

v.

JOSE J. OLAGUES, ET AL.

ORDER ALLOWING CERTIORARI. *Filed April 20, 1987.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

In addition to the Questions Presented by the petition for a writ of certiorari, the parties are invited to brief and argue the question of possible mootness.

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OCTOBER TERM, 1987

JOSEPH P. RUSSONIELLO, ET AL., PETITIONERS

v.

JOSE J. OLAGUES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the termination of the investigation in this case for lack of prosecutorial merit renders moot respondents' prayers for injunctive and declaratory relief.

2. Whether a federal court exceeds its constitutional authority under Article III when, in the absence of any legislatively created cause-of-action and standards, it entertains a pre-indictment challenge to the manner and scope of the noncoercive investigative activities of a United States Attorney.

3. Whether, assuming that Article III in some circumstances allows for pre-indictment judicial review of the manner and scope of noncoercive investigatory activities by a United States Attorney, a federal court may enjoin or declare unconstitutional such activities when those activities were not taken in bad faith or for purposes of harassment, do not violate any clearly established rights, and have not been shown to be devoid of legitimate investigatory purpose.

PARTIES TO THE PROCEEDING

Petitioners are Joseph P. Russoniello, the United States Attorney for the Northern District of California, and David Ilchert, the District Director for the United States Immigration and Naturalization Service for the San Francisco Bay Area. Louis Bergna, James D. Boitano, Marvin Church, William D. Curtis, Arthur Donner, Barbara Greenslake, Eve Lewis, George A. Mann, John Meehan, Richard Neal, William A. O'Malley, Jay Patterson, James Riggs, Arlo Smith, Keith Sorenson, Gene L. Tunney, Lon Underwood, and Ross Underwood are defendants with petitioners in the proceedings below.

Respondents are Jose J. Olagues, the Chinese for Affirmative Action, the Hispanic Coalition for Human Rights, and the San Francisco Latino Voter Registration Education Project.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the en banc Court of Appeals for the Ninth Circuit (Pet. App. 1a-38a) is reported at 797 F.2d 1511. The prior panel opinion of the court of appeals (Pet. App. 41a-75a) is reported at 770 F.2d 791. The opinions of the district court on summary judgment (Pet. App. 78a-95a) and on motion to dismiss (Pet. App. 96a-97a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1986. A suggestion for rehearing en banc by the full court of appeals was denied on December 19, 1986. On November 14, 1986, Justice O'Connor extended the time within which a petition for a writ of certiorari could be filed to and including January 23, 1987, and such a petition was filed on that date. On April 20, 1987, the Court issued a writ of certiorari and invited the

parties to brief and argue the question of possible mootness. The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II of the Constitution provides in pertinent part:

> The executive Power shall be vested in a President of the United States of America[]
>
> * * * * *
>
> * * * he shall take Care that the Laws be faithfully executed * * *.

Article III, Section 2 of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * * to all Cases, * * * to Controversies * * *.

The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

42 U.S.C. 1973i(c) provides in pertinent part:

> Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elec-

> tor, Member of the United States Senate, Member of the United States House of Representatives * * *.

California Government Code § 6253.6 (West Supp. 1987) (underscoring omitted) provides:

> (a) Notwithstanding the provisions of Sections 6252 and 6253, information compiled by public officers or public employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets, made in accordance with any federal or state law, or other data that would reveal the identity of the requester, shall not be deemed to be public records and shall not be provided to any person other than public officers or public employees who are responsible for receiving those requests and processing the same.
>
> (b) Nothing contained in subdivision (a) shall be construed as prohibiting any person who is otherwise authorized by law from examining election materials, including, but not limited to, affidavits of registration, provided that requests for bilingual ballots or ballot pamphlets shall be subject to the restrictions contained in subdivision (a).

STATEMENT

1. Petitioner, Joseph P. Russoniello, is the United States Attorney for the Northern District of California (Pet. App. 3a); co-petitioner, David Ilchert, is the District Director in San Francisco for the Immigration and Naturalization Service (INS) (*id.* at 5a). In March 1982, Russoniello received information from various sources indicating that, in one of the counties in his district, a substantial number of foreign-born persons who were not United States citizens had registered to vote, even though as noncitizens they were ineligible to do so (*id.* at 25a; J.A. 175-176).[1] Russoniello learned from the

[1] Among other things, Russoniello received a newspaper article which reported that the district attorney of Santa Clara County, California had conducted a study showing that a significant number of foreign-born noncitizens had registered for and then voted in

district attorney of that county that many of these noncitizen registrants either did not speak or were not fluent in English and, furthermore, that many had been told by the persons registering them that they were in fact eligible to vote, either because they were married to a United States citizen or because they had resided in this country for a long period (Pet. App. 25a-26a; J.A. 177-178).

Based on these facts suggesting that certain persons or organizations were registering or conspiring to register noncitizen voters in violation of 42 U.S.C. 1973i(c), and motivated in part by concern that the results of the upcoming June 8, 1982 California primary elections could be subject to challenge if noncitizen voting was widespread (Pet. App. 3a-4a, 25a-26a, 79a; J.A. 22-24, 177), Russoniello determined to investigate the extent of the noncitizen voter fraud registration problem in the San Francisco Bay Area (J.A. 177-179). Accordingly, on April 19, 1982, he wrote to the district attorneys and voter registrars in nine counties in his district requesting their assistance (Pet. App. 26a, 78a-80a; J.A. 178-179).[2] Russoniello explained that he had information indicating that a substantial number of noncitizens had recently registered to vote, that persons who did not understand English were the most susceptible to being confused or misled about their eligibility to do so,[3] and that such per-

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elections held in that county in 1980. See J.A. 176, 236; see also J.A. 23 (at least 20 of a 100 person sample were noncitizen registrants). See generally J.A. 206-215.

[2] The counties were Alameda, Contra Costa, Monterey, Napa, San Francisco, San Mateo, Santa Clara, Santa Cruz, and Sonoma.

[3] Russoniello later learned that the Spanish translation of the voter registration form being used in these counties erroneously stated that a registrant "should" be, rather than "must" be, a United States citizen (Pet. App. 79a & n.1; J.A. 122). This fact confirmed Russoniello's suspicion that registration irregularities were most likely to occur among those who did not speak English (Pet. App. 79a & n.1; J.A. 179).

sons could be identified by their requests for bilingual ballots.[4] He therefore proposed that the voter registrar in each of these counties randomly select from public records and submit to him the names of 25 recently-registered, foreign-born voters who had requested such bilingual voting materials, which he would forward to the INS for verification of the registrants' citizenship status (Pet. App. 79a-80a; J.A. 22-26, 178).[5] Russoniello further suggested that, as to registrants whom the INS could not positively identify as citizens, the district attorneys should contact the registrants, determine whether they were citizens and, if not, determine who, if anyone, had encouraged them improperly to register (Pet. App. 43a, 80a; J.A. 24-25). He made clear that he did not intend

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[4] Though foreign-born individuals are required to learn English before they may become naturalized citizens (see 8 U.S.C. 1423(1)), the federal law in effect in 1982 required these nine counties to make available "voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" (42 U.S.C. 1973aa-1a(c)), in Spanish as well as in English (Pet. App. 3a). The County of San Francisco had to make these materials available in Chinese as well (*ibid.*).

In 1984, these nine counties were relieved of their obligation under federal law to provide such bilingual election materials (Pet. App. 9a n.5; see also 49 Fed. Reg. 25887-25888 (1984)). Indeed, in November 1986, California voters adopted Proposition 63, an initiative now incorporated as Section 6 to Article III of the California Constitution, which provides that English is the "official language of California" and that public officials "shall take all steps necessary to insure that the role of English as the common language of the State of California is preserved and enhanced" (Cal. Const. Art. III, § 6). According to respondents (Br. in Opp. 12-13 n.8), Proposition 63 may bar the nine counties involved from providing bilingual voting materials.

[5] In 1982, voter registration information in the State of California, including records revealing the names of persons who had requested bilingual ballots, was a matter of public record. See Cal. Gov't Code §§ 6252, 6253 (West 1980). California law has since been amended, however, to provide that records revealing the identity of persons requesting bilingual ballots may not be made publicly available. See Cal. Gov't Code § 6253.6 (West Supp. 1987).

to prosecute any such noncitizen registrants, but would seriously "consider" prosecuting any group or individual who had deliberately conspired to register unqualified voters (J.A. 25).

The voter registrars subsequently submitted to the United States Attorney a total of 168 names (Pet. App. 43a, 80a). By checking its own records, as well as the fingerprint indices of the Federal Bureau of Investigation (FBI), the INS determined that 55 of these persons were in fact United States citizens, that 45 were definitely or probably not citizens, and that no records existed for the remaining 68 persons (*id.* at 80a; J.A. 64, 180). In late May 1982, Russoniello conveyed this information to the local district attorneys and again asked that they conduct interviews of those persons not positively identified as United States citizens (Pet. App. 5a, 80a; J.A. 62-66). Several of the local district attorneys did so, either by letter or by noncustodial contact (Pet. App. 80a-81a; see also J.A. 113-114, 155-156, 183-184, 187-188).

In September 1982, after reviewing the results of these efforts, the United States Attorney's office terminated its involvement in the investigation, turning the matter over to the FBI and the INS for routine handling pursuant to their statutory responsibilities (J.A. 180-181). The FBI apparently made some follow-up contacts during October 1982 (J.A. 223). The investigation was then terminated altogether. See Pet. App. 7a-8a, 27a, 44a; Br. in Opp. 5, 22; see also J.A. 102, 114, 156, 180-181, 184, 188, 190.

2. On May 12, 1982, however, before the investigation was terminated, respondents Jose J. Olagues, an Hispanic-American citizen whose name was randomly selected for investigation, and certain Hispanic-American and Chinese-American voting rights organizations filed this action against Russoniello and the other government officials involved in the investigation (Pet. App. 5a; J.A. 6-8).[6] Specifically alleging the course of events set forth

[6] Respondents subsequently moved for leave to file a second amended complaint adding two more individuals—Evelia Diaz-

above, respondents purported to bring their action on behalf of classes of plaintiffs who had requested foreign language election materials or had been deterred or were likely to be deterred from doing so, or who had participated in bilingual voter education efforts (J.A. 9-10). In particular, respondents asserted violations of the Fifteenth Amendment, the Equal Protection Clause, the Due Process Clause, the First Amendment, the Voting Rights Act of 1965, 42 U.S.C. (& Supp. III) 1971 *et seq.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and a right of privacy guaranteed under the California Constitution (J.A. 11-14, 15-18).[7] Respondents prayed that the district court enjoin any further culling from voter registration records of the names of persons seeking bilingual election materials, any disclosure of such information as has already been collected, and any questioning of such foreign-born persons. They also sought a declaration that these investigative activities are unlawful, and an award of monetary relief (J.A. 18-21).

Infante and Juan D. Martinez—as named parties-plaintiff. See J.A. 77-98. But the district court denied the motion to amend. See Pet. App. 76a. The court of appeals thus treated the case as if Jose Olagues was the only individual party-plaintiff. See *id.* at 2a, 5a, 11a-12a. Accordingly, in this brief, we refer to the first amended complaint as the complaint upon which this action was based. The arguments advanced herein are, however, equally applicable to the parties and allegations set forth in the second amended complaint.

[7] Specifically, respondents alleged that "Russoniello initiated a secret probe of Hispanic-American and Chinese-American voters by sending a letter to nine Bay Area District Attorneys" (J.A. 11 (emphasis omitted)); that "[s]uch an investigation * * * was not based on any reasonable suspicion that foreign born voters were committing fraud nor that the problem of voter irregularities was limited only to persons of Hispanic-American or Chinese-American descent" (J.A. 12); and that respondents had been "arbitrarily discriminated against" on the basis of their race and national origin, deprived of their "right of association and right to refuse to answer question[s] as to political activity," and "effectively intimidate[d], threaten[ed] and coerce[d]" in their registration and associational activities (J.A. 13).

In support of their claims, respondents filed affidavits concerning the adverse effects that the investigation allegedly had had and would continue to have on them. Respondent Olagues expressed his "fear" that he would "soon be contacted by local law enforcement agencies to prove my citizenship or to determine if I have been contacted by registrars of voters or special interest groups," and stated that he was "deeply troubled over the fact that I, as well as other United States Citizens, will become targets of investigations for exercising our legal right to bilingual voter information" (J.A. 45-46). Officials associated with the organizational respondents submitted declarations concerning the effects of the investigation on their efforts, stating that they had "experienced a noticeable decrease in the number of volunteers who have helped register voters" in the weeks since the investigation was initiated (J.A. 30), that the "fear instilled by the potential of such inquiries has had a chilling effect upon the activities of the [organizations] and the fulfillment of [their] objectives" (J.A. 32), and that Russoniello continued to pursue the investigation notwithstanding a request that it be terminated (J.A. 37).[8]

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[8] Representatives of other voter registration organizations, although not party to the lawsuit, also submitted affidavits concerning their perception of the effect that this investigation was having on Hispanic-Americans and Chinese-Americans. See J.A. 38-41 (Declaration of Luanne Lash); J.A. 54-56 (Declaration of Lydia Gonzalez); J.A. 75-76 (Declaration of Maria Virginia Salmon); see also J.A. 60-61 (Declaration of Rudolph G. Rodriguez). Also, several individuals whose names had been selected for investigation stated that the "investigation is unfair since [the government officials] had no reason to ever believe that [we are] illegally registered to vote" (J.A. 223 (Declaration of Lilia Isabel Medina)) and that they were "very upset and bothered" that "a secret investigation was going on about [their] qualifications to vote" (J.A. 227 (Declaration of Maria Gloria Rodriguez)). In addition, one individual who feared that his name might be selected for investigation stated that he did "not think that any citizen should have to answer any

On the government's motion, the district court, on May 24, 1982, dismissed respondents' prayer for injunctive relief, holding that it had "no jurisdiction to enjoin or otherwise control a preliminary investigation of the U.S. Attorney's office" (Pet. App. 96a). Then, on December 15, 1982, in ruling on cross-motions for summary judgment, the court dismissed the remainder of respondents' suit (*id.* at 81a). In an opinion filed later, the court noted that nothing in the record suggested that the voter interviews involved involuntary interrogation or that any individual was penalized in any way for refusing to cooperate (*id.* at 80a-81a). It also observed that the information provided by the local defendants and the INS was a matter of public record (*id.* at 84a) and that, given the evidence of possible fraud, "the United States Attorney ha[d] the right, if not the duty, to at least determine the scope of the actual problem and, if necessary, instigate required remedial action" (*id.* at 85a-87a). Accordingly, it held that defendants' action did not violate any clearly established right of the plaintiffs (*id.* at 88a), and that all defendants, including petitioners, were entitled to qualified immunity and summary judgment (*id.* at 95a).

3. A divided panel of the Ninth Circuit affirmed (Pet. App. 41a-75a). It first ruled that the termination of the investigation did not render the controversy moot, as to the claims for either monetary or equitable relief (*id.* at 44a-47a), and that the organizational respondents had standing to seek both types of relief, while the individual respondent had standing only to seek damages (*id.* at 47a-

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questions of the District Attorney[] simply because [he] didn't ask for a ballot in English" (J.A. 49 (Declaration of Luis Diaz-Infante)). Finally, the two individuals that respondents unsuccessfully attempted to add as parties-plaintiff stated, respectively that they did not "want to be bothered" (J.A. 52 (Declaration of Evelia Diaz-Infante)) and that they were "very upset at [their] local officials that are cooperating with an investigation that * * * only serves to discourage people from registering to vote, voting, and registering other voters" (J.A. 58 (Declaration of Juan D. Martinez)).

54a). The court found that the individual's allegation that the investigation had a "chilling effect" on him did not present a "justiciable claim" (*id.* at 49a), and that any "stigma" he suffered from "public disclosure that the investigation was taking place * * * apparently was self-induced by the filing of this lawsuit" (*id.* at 50a). By contrast, it found that the organizational respondents had standing to challenge the investigation because "their voter registration and educational efforts have been hindered as the direct result of the challenged investigation" (*id.* at 51a), and "they are undoubtedly the targets of Russoniello's investigation and may be charged with improperly influencing ineligible persons to register" (*id.* at 52a).

The court then held that none of the respondents were entitled to the equitable or monetary relief they sought (Pet. App. 54a-69a). While rejecting the district court's conclusion that it lacked jurisdiction to enjoin or otherwise control the investigation (*id.* at 54a), the court held that, in view of the "difficult problems of separation of powers' " (*id.* at 55a, quoting *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978)), presented by the criminal investigative process, an action to enjoin such investigative activities should be entertained "only in extraordinary circumstances" (Pet. App. 55a). Stating that "a United States Attorney is entitled, indeed required," to pursue allegations of vote fraud (*id.* at 61a), and that the present investigation was "reasonably limited in both its scope and its use of classifications" (*ibid.*), the court found no such extraordinary circumstances suggested by the record in this case (*id.* at 55a). For the same reasons, the court also upheld the district court's denial of declaratory relief (*id.* at 64a). Finally, it determined that the investigation did "not violate any 'clearly established' rights" (*id.* at 68a-69a), so that "all those sued were entitled at least to qualified, good faith immunity" from liability for damages (*id.* at 68a).[9]

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[9] Judge Nelson dissented (Pet. App. 69a-75a). She agreed with the majority that the organizations had standing and that the

4. On petition for rehearing, the court vacated the panel decision and, by a six to five vote, reversed and remanded the case to the district court (Pet. App. 1a-38a). Like the panel, the en banc majority found that defendants were entitled to immunity from monetary liability (*id.* at 23a-24a), and that the termination of the investigation for lack of prosecutorial merit did not moot respondents' prayers for injunctive and declaratory relief, because there was "a possibility of continuing adverse effects" (*id.* at 6a-10a).[10] In any event, the court held that the issues raised by this case are "capable of repetition yet evading review" (*id.* at 9a). It noted that voter registration investigations, such as the one conducted in the present case, may be of short duration, and that, "[b]ecause Russoniello is authorized to investigate election fraud and has the means to repeat a similar bilingual voter registration investigation, it is reasonable

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defendants were entitled to good faith immunity from damages (*id.* at 69a). Unlike the majority, however, she concluded that the individual respondent had standing, that extraordinary circumstances are not required to enjoin an investigation that infringes upon First Amendment rights, and that declaratory and injunctive relief should not be judged under the same standards (*id.* at 69a-70a). Judge Nelson argued that a district court always has equitable authority to enjoin an investigation that lacks a "reasonable basis" (*id.* at 71a-72a), and to issue declaratory relief concerning any unconstitutional action by a government official (*id.* at 72a-73a). Accordingly, she said that an investigation should be enjoined "if it lacks a reasonable basis or was initiated in bad faith" (*id.* at 71a) and that this investigation should, in any event, be declared unconstitutional under the Equal Protection Clause given the insufficient justification for its utilization of a suspect classification (*id.* at 75a).

[10] The court reasoned that "the termination of Russoniello's investigation is not irrevocable" (Pet. App. 7a), that these individuals "are understandably insecure in exercising their recently acquired rights as citizens, and easily intimidated by government action" (*ibid.*), and that, "[t]herefore, unless * * * the legality of [the] investigation [is determined] * * *, the [o]rganizations' registration drives may continue to suffer from the chilling effects of the investigation despite its termination" (*id.* at 7a-8a).

to believe that the [respondents] could be the targets of a similar investigation in the future" (*ibid.*). Like the panel, the en banc majority further determined that the organizational respondents had standing to seek equitable relief (*id.* at 12a-15a), but, unlike the panel, also found that respondent Olagues had standing to seek such relief (*id.* at 11a-12a). The majority reasoned that respondent Olagues "was stigmatized as a person who might have registered to vote illegally" (*id.* at 11a) and that "the Government required [him] to prove his citizenship, an affirmative obligation the Government did not place on people who request[ed] English language ballots" (*id.* at 12a).

The en banc majority then determined that the district court had jurisdiction to enjoin or declare unlawful the investigation and remanded the case for determination whether an injunction and/or a declaratory judgment should issue (Pet. App. 15a).[11] Examining the merits of respondents' claims as a guide for the district court on remand, the court declared that "the voter registration fraud investigation directed toward foreign-born, recently registered voters, requesting bilingual ballots involve[d] a suspect classification" (*id.* at 19a), may have burdened respondents' "fundamental right" to vote (*id.* at 20a), and may have "interfered with their constitutional right of association and political expression" (*id.* at 22a (footnote omitted)).[12] The court thus remanded with instructions that the district court determine whether the investigation conducted was "the least drastic means of

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[11] The court noted that the district court erred in "appl[ying] the good faith immunity standard * * * to * * * bar[] [all] equitable relief" (Pet. App. 16a n.8).

[12] At the same time, the en banc majority determined that there was "no evidence that by investigating the individual appellants, the Government intended to deny or abridge their right to vote" (Pet. App. 21a (footnote omitted)) and thus upheld "the district court[s] * * * [grant of] summary judgment on the Voting Rights Act claims" (*id.* at 22a).

achieving [the] governmental interest" in preventing voter registration fraud (*id.* at 19a), whether respondents' right to vote was unduly burdened (*id.* at 20a), and whether respondents' First Amendment interests outweighed the government's interest in preventing voter registration fraud (*id.* at 23a).

Judge Wallace, joined by Judges Sneed, Alarcon and Beezer, dissented (Pet. App. 25a-36a). Judge Wallace argued that respondent Olagues lacked standing to seek equitable relief, reasoning that there would be no reason to investigate again the voter registration of a person found to be a citizen and that, in any event, the effect of any such investigation upon him would be de minimis (*id.* at 29a). He further argued that the majority had failed "to respect the special limitations on our power to enjoin criminal investigations by the executive branch" (*ibid.*). While suggesting that "the separation of powers principle may not mandate judicial inaction in a case where the executive outrageously oversteps the limitations on prosecutorial power" (*id.* at 30a), Judge Wallace found "nothing egregious about the prosecutorial conduct in this case" (*id.* at 31a). He stated that the United States Attorney had focused his investigation on recently-registered, foreign born voters requesting bilingual ballots only "to narrow his inquiries to those persons who may have [had] knowledge of serious criminal activity" (*id.* at 33a); that any burden created by the investigation was "a burden that all citizens must be asked to bear when they are potential witnesses to unlawful conduct" (*id.* at 36a); and that neither the review of public records nor the follow-up questioning of potential witnesses "involve[d] any violation of first amendment rights" (*ibid.*). Accordingly, Judge Wallace concluded that the requirements for equitable relief against a prosecutorial investigation were not met in this case (*id.* at 31a).[13]

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[13] Judge Wallace rejected the proposition that the language based classifications used in the investigation should be subjected to strict scrutiny, but concluded, in any event, that the need for them was sufficiently compelling to survive that test (Pet. App. 31a).

Judge Sneed filed a separate opinion concurring in Judge Wallace's dissent (Pet. App. 37a-38a). Judge Hug filed a separate dissent arguing that the case was moot (*id.* at 36a-37a).

SUMMARY OF THE ARGUMENT

I. This case is now moot. The voter registration fraud investigation giving rise to this litigation ended approximately five years ago, and there is no reasonable expectation that it will be reopened. The United States Attorney initiated the investigation in response to unique conditions that no longer exist and terminated it precisely because it failed to produce evidence justifying further action. There are no continuing adverse effects suggesting a controversy as to whether injunctive or declaratory relief might issue. Nor does this case fit within the "capable of repetition, yet evading review" exception to ordinary Article III mootness principles. There is nothing peculiarly short-lived about governmental action directed against voter fraud and, to whatever extent an investigation leads to the filing of criminal charges, objections to government conduct can be raised in that proceeding. In any event, respondents have not made a reasonable showing that they are likely to be subjected again to the allegedly illegal activity that they challenge in this case.

II. Assuming, arguendo, that this lawsuit is not moot, it is nevertheless "nonjusticiable" under Article III of the Constitution. At least in the absence of legislation creating legal rights and standards by which the Executive is to be limited in its investigation of criminal cases, review of a prosecutor's preliminary conduct is not a proper subject for the exercise of the "judicial Power." Pre-indictment decisions concerning whether, when, and how to investigate potential criminal activity are an integral part of the prosecutorial power and, in general, should not be subjected to judicial review until the Executive Branch engages in coercive or publicly accusatory activity. Internal, deliberative activities of the Executive

Branch are neither "final" nor "authoritative" and thus lack the focus necessary for limited judicial review. Furthermore, the internal, deliberative activities of the Executive Branch are inherently preliminary and ambiguous, and thus are not subject to judicially manageable standards.

The voter fraud investigation challenged in this case did not involve the sort of coercive or publicly accusatory activity essential to a judicially cognizable controversy. It included the search of public records for information concerning recent voter registrants; the circulation of that information among various government officials; and voluntary, noncustodial interviews of various individuals whom were believed to have information about possible criminal activity. None of these activities is an appropriate predicate for the exercise of the "judicial Power."

III. Assuming, arguendo, that the separation of powers between the Executive and Judicial Branches in some circumstances allows for pre-indictment judicial review of the manner and scope of noncoercive activities of a United States Attorney, it is nevertheless true that injunctive and declaratory relief cannot issue here. Settled principles of equity jurisprudence provide that state law enforcement activities may be enjoined or declared unconstitutional only in "extraordinary circumstances." No lesser restriction on the judiciary's equitable powers should apply where federal criminal investigative activities are in issue. No such "extraordinary circumstances" exist in this case.

Respondents have not alleged sufficient injuries to provide themselves with standing to seek equitable relief, much less the "great and immediate" irreparable injury necessary to justify the granting of equitable relief. Respondents are unable to establish a reasonable likelihood that they will again be subjected to the activities about which they complain. In any event, the harms they allege can be adequately remedied through the defense of any prosecution that might result or by an action for money damages.

Nor were the circumstances extraordinary in the sense that they involved governmental action conducted in bad faith, for the purpose of harassing respondents, or in flagrant disregard of respondents' rights. The government possessed information indicating that various persons or organizations may have been conspiring fraudulently to register unqualified voters. It was proper, and perhaps obligatory, that an investigation be conducted. That the ensuing investigation in some sense focused on persons of Chinese-American and Hispanic-American descent is neither alarming nor problematic. Law enforcement officials may consider group characteristics and statistical profiles, including the national origin or race of suspects and witnesses, in narrowing their investigations. The United States Attorney's focus on the registrants' foreign birth, recent registration, and request for bilingual ballots reflects just such an effort to identify those persons who were most likely to possess information about the problem he was investigating. Accordingly, the court below should not have remanded this case for further proceedings with respect to the prayers for equitable relief.

ARGUMENT

I. THE TERMINATION OF THIS VOTER REGISTRATION FRAUD INVESTIGATION FOR LACK OF PROSECUTORIAL MERIT MOOTS RESPONDENTS' PRAYERS FOR INJUNCTIVE AND DECLARATORY RELIEF

A. The court of appeals remanded this case for trial on the issue of whether injunctive or declaratory relief should be granted against the conduct of a criminal investigation which ended several years ago. This Court has long said that a lawsuit is "moot when the issues presented are no longer 'live' [and] the parties lack a legally cognizable interest in the outcome" (*Powell* v. *McCormack*, 395 U.S. 486, 496 (1969)). Issues are no longer "live" when the conduct giving rise to them has

ceased and " 'there is no reasonable expectation * * *' that the alleged violation will recur" (*County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979), quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Parties lack a legally cognizable interest in a lawsuit's outcome when "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation" (*County of Los Angeles* v. *Davis*, 440 U.S. at 631). See also *Defunis* v. *Odegaard*, 416 U.S. 312, 316-319 (1974). These conditions are satisfied here.

As respondents concede (Br. in Opp. 5, 22), all of the conduct at which the lawsuit was directed—the culling of names of persons requesting bilingual election materials from voter registration files, the circulation of those names among Russoniello, the INS, and certain local government officials, and the plan to question a subset of persons requesting bilingual ballots concerning the circumstances under which they had been encouraged to register—came to an end in 1982 when the investigation was terminated. See Pet. App. 5a, 7a-8a, 27a, 44a, 80a-81a; J.A. 113-114, 155-156, 180-181, 183-184, 187-190. There is no reason to suppose that it will be reopened.[14]

The investigation was tailored to the unique conditions confronted in March and April 1982. At that time, available information indicated that a substantial number of foreign-born persons had recently registered to vote, that those persons may have been misled about their

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[14] The court below erred in suggesting (Pet. App. 7a) that this case is not moot because "the termination of Russoniello's investigation [was] not irrevocable." This Court has never suggested that a case is moot only where there is no possibility that the challenged conduct will recur. That a slight possibility exists that the challenged conduct could recur at some unspecified time in the future "is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court" (*O'Shea* v. *Littleton*, 414 U.S. 488, 498 (1974)). See also *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969). There must be a "reasonable likelihood" that the conduct will recur. See *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 72 (1983).

eligibility to vote, and that, if the improper registrations were widespread, the imminent June 8, 1982 elections could be subject to challenge. Given the time constraints involved, the officials made only a preliminary inquiry into the problem, using criteria calculated to give a representative insight into the breadth and nature of any voter registration fraud. Moreover, they terminated that preliminary inquiry when "it failed to produce evidence supporting any further investigative efforts" (Pet. App. 8a) and, over the intervening five years, they have not used the data gathered in 1982 in any such voter registration fraud investigation, even though federal elections were held in 1984 and 1986. See J.A. 102, 113-114, 155-156, 180-181, 183-184, 187-190. In these circumstances, it is clear that there is "no reasonable likelihood" that the challenged conduct will recur. See *Iron Arrow Honor Society* v. *Heckler*, 464 U.S. 67, 72 (1983) (where defendant has publicly announced its decision to cease and desist from challenged conduct and not to return to it, that conduct cannot reasonably be expected to recur); *County of Los Angeles* v. *Davis*, 440 U.S. at 631-632 (where procedure used only once and in response to a unique set of conditions, challenged conduct cannot reasonably be expected to recur).[15]

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[15] There is no basis in this case for suggesting that Russoniello and the other government officials terminated the investigation simply to moot the lawsuit. Cf. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-633 & n.5 (1953) (citation omitted) (prayers for injunctive and declaratory relief cannot be mooted by " 'protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption' "). Russoniello actually refused requests by respondents and others to terminate the investigation. See J.A. 37, 219-220. Moreover, he continued the investigation for four months after the filing of the lawsuit and terminated it only upon determining that it had produced no evidence upon which further investigatory or prosecutorial action could be based. See Pet. App. 8a; J.A. 180-181. Furthermore, in the five years since the investigation was terminated, neither Russoniello nor any other official has shown any interest in

Nor are there any substantial continuing effects from the past investigation sufficient to sustain a finding of a live controversy with respect to the injunctive and declaratory relief requested in this case. Respondents allegedly suffered injury from the manner in which petitioners and other officials gathered and used information about the requests of foreign-born registrants for bilingual election materials. But any injuries allegedly suffered by respondents as a result of these investigative activities were properly the subject of respondents' prayer for monetary relief, and there can be no reasonable claim of continuing injury—justifying equitable relief—from conduct which ended approximately five years ago. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105-109 & nn. 7-8, 111 (1983) (no case or controversy with respect to injunctive or declaratory relief unless there is "a real and immediate threat of future injury by the defendant"); *O'Shea* v. *Littleton*, 414 U.S. 488, 495-496 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects.").[16]

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reviving it; rather, they have announced to the courts, the respondents, and the public that this particular investigation has ended. See J.A. 102, 114, 155-156, 180-181, 184, 188, 190.

[16] That the government officials in this case had an immunity from damages (because they acted in objective "good faith") does not change this result. See *Ashcroft* v. *Mattis*, 431 U.S. 171, 171-172 (1977) (per curiam). Nor can this conclusion be avoided on the ground suggested by the court below (Pet. App. 7a-8a) that because recently-registered, foreign-born persons are "easily intimidated by government action," and thus may continue to be afraid to vote or request bilingual ballots, there are continuing adverse effects sufficient to satisfy the "case" or "controversy" requirement. As this Court has said, "[i]t is the *reality* of the threat of repeated injury * * *, not the [respondents'] subjective apprehensions" concerning such future injury, that is relevant (*City of Los Angeles* v. *Lyons*, 461 U.S. at 107 n.8 (emphasis in original)).

B. Nor does this investigation fit within the "capable of repetition, yet evad[ing] review" exception to ordinary Article III mootness principles. That doctrine applies "only in exceptional situations" (*City of Los Angeles* v. *Lyons*, 461 U.S. at 109), specifically, where (1) the challenged action is "by nature short-lived" (*Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 547 (1976)), and where (2) there is a "reasonable expectation that the same complaining party [will] be subjected to the same action again" (*Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam)). Accord, *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam); *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U.S. 173, 187 (1979). Neither condition is satisfied here.

There is nothing peculiarly short-lived about governmental action aimed at identifying, rooting out, and possibly punishing conduct involving voter registration fraud, such as would suggest that those activities will evade effective judicial review. Compare *Defunis* v. *Odegaard*, 416 U.S. at 319 (law school admission practices will not by their nature evade effective review), with *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 546-547 (pre-trial publicity restraints by their nature will evade effective review); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (restrictions on means for aborting pregnancy by their nature will evade effective review). Like other types of criminal investigations, those concerning vote fraud may be either long or short and, indeed, as they often require extensive data-gathering, will often be quite lengthy. Of course, some such investigations carry a special urgency, imposed by circumstances such as the impending election that was a matter of substantial concern in this case. Even in instances where the investigation is short, however, affected parties will be provided with a forum in which to raise any objections they may have to the motivation or manner of the investigation where the government ultimately takes legal action. Only where the investigation culminates in a decision to take no action, either

criminal or civil—thus vindicating those under scrutiny—is a suspect or other affected party in any sense likely to be without a forum in which to air his or her grievances. Even then, however, to the extent such matters present a justiciable controversy, these investigative activities may be challenged in an action for damages. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 109.

In any event, respondents have also made no reasonable showing that they are likely to be subjected again to investigative action like that challenged in this case. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 109; *Murphy* v. *Hunt*, 455 U.S. at 482-483. The government now knows that respondent Olagues is a legally registered citizen and will obviously not investigate him again as a possible non-citizen voter. More generally, the unique conditions that brought about this investigation no longer exist, and it is unrealistic to suppose that the government would reinstitute any similar investigation—especially since this one was terminated precisely because it failed to produce evidence meriting further inquiry. Cf. *City of Los Angeles* v. *Davis*, 440 U.S. at 632; *County of Los Angeles* v. *Lyons*, 461 U.S. at 109. Indeed, as respondents themselves note (Br. in Opp. 11-12), California has since amended its law to provide that "information compiled by public officers or public employees revealing the identity of persons who have requested bilingual ballots * * * or other data that would reveal the identity of the requester, shall not be deemed to be public" (Cal. Gov't Code § 6253.6 (West Supp. 1987) (underscoring omitted)), and it thus appears that government officials could not collect voter registration information in the same way as they did here, even if they wanted to do so.[17] Hence,

[17] In fact, the California Constitution has recently been amended to require public officials to "insure that the role of English as the common language of the State of California is preserved and enhanced" (Cal. Const. Art. III, § 6). Thus, as respondents note (Br. in Opp. 12-13 n.8), it may be the case that bilingual ballots will not be available in the future, thus rendering impossible the sort of inquiry undertaken here.

there can be no "reasonable expectation that the same complaining part[ies] [will] be subjected to the same action again" (*Weinstein* v. *Bradford*, 423 U.S. at 149).

C. In short, this case is moot under both ordinary mootness principles and the "capable of repetition, yet evading review" exception. The appropriate disposition, therefore, is to vacate the judgment of the court below and to remand with instructions that the district court be directed to dismiss the prayers for injunctive and declaratory relief. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

II. THE JUDICIARY EXCEEDS ITS CONSTITUTIONAL AUTHORITY UNDER ARTICLE III WHEN, IN THE ABSENCE OF LEGISLATION CREATING A CAUSE OF ACTION AND ENUNCIATING STANDARDS BY WHICH THE GOVERNMENT'S CONDUCT IS TO BE JUDGED, IT ENTERTAINS A PRE-INDICTMENT CHALLENGE TO THE NONCOERCIVE INVESTIGATIVE ACTIVITIES OF A UNITED STATES ATTORNEY

In any event, this lawsuit is "nonjusticiable" under Article III of the Constitution, which limits the federal courts to the exercise of "judicial Power." At least in the absence of legislation imposing restrictions and creating rights of action concerning the way in which the Executive performs its criminal investigative functions, the prosecutorial power, which necessarily encompasses pre-indictment decisions concerning whether, when, and how to investigate possible criminal activity, is committed to the Executive Branch. Actions which are themselves coercive in nature, impinging in a direct way on existing legal rights, are generally subject to judicial challenge as the means of redeeming those rights. But until the Executive Branch engages in such coercive activity, its actions are not of a form appropriate for judicial review. Internal, deliberative activities of the Executive Branch are neither final nor authoritative and thus do not provide an appro-

priate focus for review by courts of limited jurisdiction. Nor, in the absence of legislation creating a right of action to enforce specific rules concerning the performance of such noncoercive deliberative actions, are there judicially manageable standards by which courts could review them. Allowing judicial review in these circumstances would, therefore, short-circuit the criminal investigative process and impose an inappropriate task on the judiciary.

A. Article III Of The Constitution Respects The Separation Of Powers Between The Executive And Judicial Branches

The Constitution is structured to give each Branch of government specified powers in relation to the other Branches. See The Federalist No. 51, at 320 (J. Madison). It ensures that each Branch is confined by a set of "checks" and "balances" to its respective authority. See *Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986), slip op. 6-7; *Buckley* v. *Valeo*, 424 U.S. 1, 120-124 (1976) (per curiam); *INS* v. *Chadha*, 462 U.S. 919, 960-963 (1983) (Powell, J., concurring in the judgment); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); The Federalist No. 47, at 325 (J. Madison) (C. Rossiter ed. 1961). The separation of powers also ensures that the involvement of one Branch in the affairs of another Branch is limited and carefully defined. See *Allen* v. *Wright*, 468 U.S. 737, 750-752 (1984); *Northern Pipe Line Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 57-62 (1982) (plurality opinion); *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629-631 (1935); *O'Donoghue* v. *United States*, 289 U.S. 516, 530-534 (1933). Article III of the Constitution embodies and implements both aspects of this separation of powers.

Article III does not grant the federal courts "an unconditioned authority to determine the constitutionality of legislative or executive acts" (*Valley Forge Christian*

College v. *Americans United For Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982)). Rather, Article III limits the courts to the exercise of "judicial Power" in "Cases" and "Controversies." U.S. Const. Art. III, § 2, Cl. 1. The terms "judicial Power" and "Cases and Controversies" reflect historical practices that have long limited courts to a role that is " 'strictly judicial in its character' " (*Muskrat* v. *United States*, 219 U.S. 346, 355 (1911), quoting *Gordon* v. *United States*, 117 U.S. 697, 706 (1864)). See also 2 *The Records of the Federal Convention of 1787*, at 430 (M. Farrand ed. 1966). Under these historic practices, federal courts have been confined to "a role consistent with a system of separated powers and [to disputes] which are traditionally thought to be capable of resolution through the judicial process" (*Flast* v. *Cohen*, 392 U.S. 83, 97 (1968)).

This Court has developed various doctrines to explain the circumstances in which "Cases" or "Controversies" may be said to have "assume[d] such a form that the judicial power is capable of acting on [them]" (*Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) 738, 819 (1824)). See generally *Flast* v. *Cohen*, 392 U.S. at 97. Through "standing" doctrine, for example, the Court has instructed that the authority of federal courts may be invoked only to address distinctly personal grievances, and not to address " 'generalized grievances about the conduct of government or the allocation of power in the Federal System' " (*United States* v. *Richardson*, 418 U.S. 166, 173 (1974) (citation omitted)). See also *Allen* v. *Wright*, 468 U.S. at 753-756; *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Likewise, through "mootness" doctrine, the Court has taught that federal courts may intervene only to resolve actual disputes and may not render advisory decisions concerning questions of abstract interest. See *Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987), slip op. 3-4; *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). Furthermore, through "ripeness" doctrine, the

Court has admonished that federal courts may address only "final and authoritative" governmental actions (*MacDonald, Sommer & Frates* v. *County of Yolo*, No. 84-2015 (June 25, 1986), slip op. 7); federal courts must, this Court has said, avoid "entangl[ement] * * * in abstract disagreements over administrative policies" (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148 (1967)). And, finally, through "political question" and similar doctrines, the Court has made clear that some issues lack judicially manageable standards and thus must be held to "lie[] beyond judicial cognizance" altogether (*Baker* v. *Carr*, 369 U.S. 186, 211 (1962)). See *Goldwater* v. *Carter*, 444 U.S. 996 (1979); *Coleman* v. *Miller*, 307 U.S. 433 (1939). See also *Barenblatt* v. *United States*, 360 U.S. 109, 112 (1959).

These doctrines of "'standing[,] * * * mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government'" (*Allen* v. *Wright*, 468 U.S. at 750, quoting *Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1178-1179 (D.C. Cir. 1982) (Bork, J., concurring), cert. denied, 464 U.S. 823 (1983)). These doctrines recognize that certain questions about the structure and operation of government are beyond the "judicial Power" (*Powell* v. *McCormack*, 395 U.S. 486, 516-549 (1969)), and that "'[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either'" (*Valley Forge Christian College* v. *Americans United for Separation of Church & States, Inc.*, 454 U.S. at 473-474) (citation omitted)). They therefore join together to "define[] with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," and to state "fundamental limits on [the] federal judicial power in our sys-

tem of government" (*Allen* v. *Wright*, 468 U.S. at 750). See generally *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975) (these doctrines are "founded in concern about the proper—and properly limited—role of the courts in a democratic society").

B. Absent Legislation Creating Judicially Enforceable Rights And Providing Applicable Standards, The Judicial Branch Exceeds Its Constitutional Authority When It Supervises Or Reviews The Noncoercive Information-Gathering And Deliberative Activities Of The Executive Branch

The authority of the judicial branch to oversee the activities of the coordinate branches is thus limited by a constellation of doctrines to situations where a question amenable to legal analysis has been focused in a concrete manner by a specific controversy between interested parties. At least in the absence of legislation creating judicially enforceable rights and providing applicable standards concerning the prosecutor's performance of his investigative functions, we submit that these requirements of justiciability are not met where a criminal investigation has not yet taken the form of coercive or publicly accusatory action.

1. Article II of the Constitution vests the Executive, not the Judiciary, with the exclusive authority to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. This delegation has long been held to include the power to prosecute—*i.e.*, the authority to decide whether, when, and in what sort of cases to charge a violation of the laws of the United States. See, *e.g.*, *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979) ("[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion"); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978) (footnote omitted) (assuming probable cause, decision whether and what to charge "rests entirely in [the prosecutor's] discretion"); *United*

States v. *Nixon*, 418 U.S. 683, 693 (1974) (the "Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *United States* v. *Thompson*, 251 U.S. 407 (1920) (court order quashing indictment for failure to obtain permission of court to resubmit to grand jury invades functions of the United States Attorney and the grand jury); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868) ("[p]ublic prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney").

The textual responsibility to see that the laws are faithfully executed requires the Executive Branch to "obtain[ ], review[ ], and evaluat[e] * * * evidence" (*Imbler* v. *Pachtman*, 424 U.S. 409, 431 n.33 (1976)). See *Community for Creative Non-Violence* v. *Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("The power to decide when to investigate, [like the power to decide] when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws."); *Nathan* v. *Smith*, 737 F.2d 1069, 1079 (D.C. Cir. 1984) (Bork, J., concurring) ("the principle of Executive control extends to all phases of the prosecutorial process"). Indeed, the responsible exercise of the power to prosecute presumes that an investigation will precede the filing of charges. See *United States* v. *Goodwin*, 457 U.S. 368, 382 n.14 (1982) ("a prosecutor should not file any charge until he has investigated fully all of the circumstances surrounding a case"); *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981) ("the decision of the Attorney General, or a prosecuting attorney, to initiate a prosecution is not made in a vacuum. * * * [T]he right to make the decision * * * must include some limited right to gather necessary information"). Accordingly, the lower federal courts have routinely rejected the notion that the courts may exercise general supervision over the investigative activities of the Executive Branch. See *Reporters Committee for*

Freedom of the Press v. *American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979); *Socialist Workers Party* v. *Attorney General*, 510 F.2d 253, 255 (2d Cir. 1974) (per curiam), motion for stay denied, 419 U.S. 1314 (1974) (Marshall, J.); *LaRouche* v. *Webster*, 566 F. Supp. 415, 418 (S.D.N.Y. 1983); see also *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978).

2. This is not to suggest that the performance of investigative or prosecutorial activities by the Executive Branch is in all instances immune from judicial review. It may well be within the power of Congress to impose substantive limitations on the means used by the Executive Branch in its enforcement of legislatively enacted criminal provisions and, in doing so, to provide for judicial enforcement. In the absence of such congressional action, however, judicial review is appropriate only at such time as the Executive Branch engages in concrete and coercive action.

Once a prosecution has been formally initiated, either by the filing of an information or by the return of an indictment, an aggrieved individual is clearly entitled to challenge his or her prosecution on a variety of constitutional or procedural grounds, including the motivations of the prosecutor in bringing it. See *Wayte* v. *United States*, 470 U.S. 598, 608 (1985); *Bordenkircher* v. *Hayes*, 434 U.S. at 364; *Blackledge* v. *Perry*, 417 U.S. 21, 28 (1974). Moreover, even prior to the bringing of charges, certain exercises of governmental power may be subjected to judicial review. A federal court may, for example, review claims that the Executive Branch has committed an unreasonable "search" or "seizure" (see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)), or has attempted to subpoena material in violation of the First or Fourth Amendments (see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1946); cf. *Branzburg* v. *Hayes*, 408 U.S. 665, 707-708 (1972) (prosecutor may not use grand jury and its subpoena powers as instrument of oppression)).

Review and supervision of information-gathering and deliberation within the Executive Branch—in the absence of coercive action or legislatively created rights and standards of review—is not, however, an appropriate exercise of judicial authority. See *Laird* v. *Tatum*, 408 U.S. 1, 11-15 (1972); *Heckler* v. *Chaney*, 470 U.S. 821, 831-834 (1985). At issue is Executive Branch action that has not come to fruition, whose justifications are still being explored and whose consequences are only vaguely perceivable. And, as this Court has made clear in analogous contexts, when the Executive Branch "does not exercise its *coercive* power over an individual's liberty or property rights," it "does not infringe upon areas that courts often are called upon to protect" (*id.* at 832 (emphasis in original)).

In *Laird* v. *Tatum*, 408 U.S. 1 (1972), for example, the Court faced the question "whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose" (408 U.S. at 10). The Court answered this question in the negative, reasoning that the investigative and data-gathering activities of the Department of Army at issue there were not "regulatory, proscriptive, or compulsory in nature" (*id.* at 11) and, accordingly, that the private citizen-plaintiffs were not entitled " 'to invoke the judicial power to determine the validity of [such] executive * * * action' " (*id.* at 13, quoting *Ex parte Levitt*, 302 U.S. 633, 634 (1937)). Otherwise, the Court concluded, "the federal courts [would be] virtually continuing monitors of the wisdom and soundness of Executive action" (408 U.S. at 15).

Similarly, in *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), the Court applied the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 701 *et seq.* (APA), in finding

no "final agency action" subject to judicial review in the Federal Trade Commission's issuance of a complaint that it had "reason to believe" that several major oil companies were violating Section 5 of the Federal Trade Commission Act. The Court reasoned that "the Commission's averment of 'reason to believe' * * * [was] not a definitive statement of position" (449 U.S. at 241), but rather "a threshold determination that further inquiry is warranted" (*ibid.*), and that, since this determination has no "legal or practical effect" except to impose a "burden of responding to the charges made against it" (*id.* at 242), judicial review would be premature, an "interference with the proper functioning of the agency[,] and a burden for the courts" (*ibid.*).

3. The concerns articulated in *Laird* and *Standard Oil*, justifying the conclusion that a "final" and "authoritative" decision must be made before judicial review may occur under either the Constitution or the APA, strongly suggest that judicial review in the present case is likewise premature. "A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes" (*MacDonald, Sommer & Frates* v. *County of Yolo*, slip op. 7). It cannot judge whether government has unnecessarily chilled First Amendment activity when government itself has not engaged in a definitive act. The court would need information that is beyond its reach (because it has yet to be gathered by the Executive Branch)—such as the extent of the problem to be addressed, the cause of the problem, the alternative means for resolving that problem, and the viability of those alternatives. See *Laird* v. *Tatum*, 408 U.S. at 11, 13-15. Likewise, a court cannot judge whether government has engaged in unconstitutional "selective prosecution" until alleged law offenders are actually being prosecuted in the first instance. Again, the court would need information that is beyond its reach (because it has yet to be gathered by the Executive Branch)—such as the identity and composition of the entire group of law

offenders, the circumstances of each offender's violation, and the bars to prosecution of particular offenders (as viewed by the Executive Branch). See *Wayte* v. *United States*, 470 U.S. at 609-610; *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962). The courts need a final determination by the Executive Branch, thus committing it to action, to provide the "focus for judicial review" (*Heckler* v. *Chaney*, 470 U.S. at 832).

The concerns articulated in *Laird* and *Standard Oil* also relate to the absence of judicially discoverable and manageable standards for reviewing the manner and scope of noncoercive deliberative activities of the Executive Branch. See *Wayte* v. *United States*, 470 U.S. at 608; *Heckler* v. *Chaney*, 470 U.S. at 830-832; see generally *Baker* v. *Carr*, 369 U.S. at 226. The data-gathering and deliberative aspects of government investigations are preliminary and are often initiated in response to tips, rumors, and other information that is often unreliable and may, upon investigation, turn out to be false. On that account, they are necessarily fluid and unstructurable, evolving according to the information that they uncover. See *United States* v. *Goodwin*, 457 U.S. 368, 380-382 & n.14 (1982). Their scope, intensity, and duration varies with the resources that the Executive Branch has available to devote to them. And the availability of such resources varies with the Executive Branch's overall agenda, the likelihood that the investigation will uncover prosecutable crimes, and the state of current funding by Congress. There are no accessible principles indicating how the Executive Branch should respond to this array of considerations. Accordingly, this Court has said that the question of how the government should proceed in view of all of these factors is "not readily susceptible to the kind of analysis the courts are competent to undertake" (*Wayte* v. *United States*, 470 U.S. 598, 607 (1985)).

Taken together, these concerns indicate that subjecting noncoercive data-gathering and deliberative activi-

ties to judicial scrutiny will spell great mischief for the orderly administration of law by both the Executive and Judicial Branches. Persons likely to be investigated or prosecuted have an overwhelming incentive to short-circuit the processes by which information is gathered concerning their criminal activity, and authorizing judicial review of preliminary data-gathering activities would create a powerful tool toward that end.[18] Through such litigation, such persons could divert both courts' and prosecutors' "energy and attention * * * from the pressing duty of enforcing the criminal law" (*Imbler* v. *Pachtman*, 424 U.S. 409, 425 (1976)), deny prosecutors the opportunity to correct their own mistakes (*FTC* v. *Standard Oil Co.*, 449 U.S. at 243), and "delay[] the criminal proceeding" (*Wayte* v. *United States*, 470 U.S. at 607). Prosecutors would thus be given an incentive to avoid these problems by foregoing investigations of particularly obstreperous litigants, by resorting to the grand jury to investigate possible criminal activity (rather than use the less expensive and perhaps less intrusive means available to prosecutors' offices),[19] or, if necessary, by

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[18] Litigants might also try to use such litigation to discover the identity of, and thus to intimidate, the Executive Branch's informants. The Court has noted a similar concern in its grand jury cases. See *United States* v. *Sells Engineering Inc.*, 463 U.S. 418, 424 (1983). See generally *Roviaro* v. *United States*, 353 U.S. 53 (1957) (discussing informants' privilege).

[19] A grand jury, of course, has "wide latitude to inquire into violations of criminal law" and to "determine alone the course of its inquiry" (*United States* v. *Calandra*, 414 U.S. 338, 343 (1974)). Grand jurors "may act on tips, rumors, evidence offered by the prosecutor, or their own personal knowledge" (*United States* v. *Dionisio*, 410 U.S. 1, 15 (1973)), and "a sufficient basis for an indictment may only emerge at the end of the investigation when all the evidence has been received" (*id.* at 15-16). See also *Costello* v. *United States*, 350 U.S. 359, 362, (1956). Importantly, the Court has held that the federal courts are without authority to review the competency, relevancy, or constitutionality of the evidence that a grand jury considers (see *United States* v. *Calandra*, 414 U.S. at 344-345, 353-355), to assess the basis upon which a grand jury has

pursuing prosecutions without having fully investigated all circumstances surrounding a case. See generally *United States* v. *Goodwin*, 457 U.S. at 381-382 & n.14; *Butz* v. *Economou*, 438 U.S. 478, 509-517 (1978); *United States* v. *Lovasco*, 431 U.S. 783, 792-796 (1977); *Imbler* v. *Pachtman*, 424 U.S. at 424-431. The avoidance of these unfortunate consequences is yet another reason that the "judicial Power" should not be construed to authorize review of noncoercive Executive Branch activities.

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initiated an investigation (see *United States* v. *Dionisio*, 410 U.S. at 13-17), or to "set limits to the investigation that the grand jury may conduct" (*Blair* v. *United States*, 250 U.S. 273, 282 (1919)). Rather, only the coercive aspects of a grand jury's investigation (as that coercion applies to the person affected) may be challenged. See *United States* v. *Dionisio*, 410 U.S. at 11-12, 16-18; *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906); see also *Branzburg* v. *Hayes*, 408 U.S. at 707-708.

The parallel between the limits on judicial review of grand jury investigations and the limits on judicial review of Executive Branch investigations is not accidental. As this Court has said, "'"[t]he public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury"'" (*Butz* v. *Economou*, 438 U.S. 478, 510 (1978), quoting *Yaselli* v. *Goff*, 12 F.2d 396, 404 (2d Cir. 1926) (citation omitted)). Indeed, the Court has pointed out that the grand jury depends "largely on the prosecutor's office to secure the evidence or witnesses it requires" (*United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983) (footnote omitted)). Thus, it should be no surprise that the prosecutor, like the grand jury, "must be free to pursue [his] investigation unhindered by external influence or supervision * * *" (*United States* v. *Dionisio*, 410 U.S. at 17).

Indeed, an irony here is that, based on the information he had received, it would have been entirely appropriate for Russoniello to have conducted his investigation through a grand jury. Russoniello's discretionary decision to proceed less formally is fully in keeping with this Court's admonition that "[e]nforcement officials taking the initiative in grand-jury proceedings * * * should be sensitive to the considerations making for wise exercise of such investigatory power * * * where the noncoercive assistance of other federal agencies may render it unnecessary to invoke the compulsive process of the grand jury" (*Hoffman* v. *United States*, 341 U.S. 479, 485 (1951)). See also *United States* v. *Mara*, 410 U.S. 19, 44 (1973) (Marshall, J., dissenting).

It is no answer to these arguments that non-coercive investigative activity is often a cause for concern to those upon whom it focuses. Certainly few people welcome the opportunity to be a target or subject of official inquiry. And some may greatly resent, for legitimate or illegitimate reasons, the incompleteness of an investigation or the criteria upon which that investigation is based.[20] As is their right, these people sometimes make their views known to whatever combination of the political branches and the press seems most availing, and they are not without substantial remedies in these fora.[21] Failing relief there, however, the fear and resentment that results from being involved in or identified with a criminal investigation is simply " 'part of the social burden of living under government' " (*Petroleum Exploration, Inc.* v. *Public Service Comm'n*, 304 U.S. 209, 222 (1938) (citation and footnote omitted)). See *FTC* v. *Standard Oil Co.*, 449 U.S. at 244; *Younger* v. *Harris*, 401 U.S. 37, 46-47

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[20] The affidavits that respondents have submitted indicate that the investigation of persons requesting bilingual ballots has made members of the Hispanic-American and Chinese-American communities in the San Francisco Bay Area "angry" (J.A. 58, 76), "outraged" (J.A. 76), "upset" (J.A. 52, 58, 227, 228), "bothered" (J.A. 227), "deeply concerned" (J.A. 33), and "indignant" (J.A. 222). They fear that they will be "contacted" (J.A. 45); they "resent government interference with [their] right to privacy" (J.A. 49); and they do not want "to be bothered in that way" (J.A. 52).

[21] The Justice Department, for example, has an Office of Professional Responsibility, as well as an Office of Public Integrity, and has long maintained procedures under which complaints may be filed against United States Attorneys. See 28 C.F.R. 0.39. Moreover, the American Bar Association has promulgated special standards to guide the conduct of prosecutors. See Model Code of Professional Responsibility EC 7-13 (1980). This Court has accordingly stated that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers" (*Imbler* v. *Pachtman*, 424 U.S. at 429 (footnote omitted)). See also *Malley* v. *Briggs*, No. 84-1586 (Mar. 5, 1986), slip op. 7 n.5.

(1971); *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); cf. *United States* v. *Marion*, 404 U.S. 307, 320-321 (1971) ("Arrest is a public act that may seriously interfere with the defendant's liberty[.] * * * Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer."); *Blair* v. *United States*, 250 U.S. 273, 281 (1919) ("the giving of testimony and the attendance upon court or grand jury in order to testify are public duties * * * [and] [t]he personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public"). Allegations of "chill" and "stigma" from a criminal investigation can create a justiciable controversy only when they are connected to "regulatory, proscriptive, or compulsory" action of government. See *Laird* v. *Tatum*, 408 U.S. at 11; *Heckler* v. *Chaney*, 470 U.S. at 832.

C. The Government Officials Involved In This Investigation Did Not Subject Respondents To Any Coercive Government Action

In this case, it is quite clear that respondents were not subjected to any such "regulatory, proscriptive, or compulsory" investigative or prosecutorial action. The government officials did not seek a warrant or otherwise conduct any search or seizure of respondents' persons or premises. They did not compel respondents to provide information by subpoena or custodial interrogation. And they did not bring any criminal charges.[22] Rather, Rus-

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[22] Russoniello suggested in his letter to the district attorneys that he would seriously "consider" prosecuting any group or individual who had deliberately conspired to register unqualified voters. J.A. 23. But Russoniello made this suggestion without knowing the identities of the respondents (or the identities of any other person whom he could prosecute). Thus, he did nothing more than make an impersonal statement that, if he discovered federal law was being violated, he would enforce it.

soniello requested that the voter registrars of the nine counties randomly select from public records and submit to him the names of 25 recently-registered foreign-born voters who had requested bilingual election materials; the INS then searched its own records (and the records of the FBI) and verified the citizenship status of the names submited to Russoniello; and, on receiving the INS's report from Russoniello, the district attorneys conducted noncustodial interviews of various individuals whom INS had been unable positively to identify as citizens. As the district court noted, "all of the information provided by the local defendants and the INS [was] a matter of public record" (Pet. App. 84a); all interviews and contacts were voluntary and non-custodial (*id.* at 80a-81a); "nor is there any evidence as to any individual being penalized in any way for refusing to cooperate" (*id.* at 81a).[23] In short, there is no basis for suggesting that the government here took coercive action against anyone. Accordingly, the courts below should not have entertained respondents' challenge to the manner and scope of this voter registration fraud investigation.

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[23] Indeed, respondents introduced the declaration of only one person who was actually contacted by the government—Lilia Isabel Medina—and nothing in her testimony evidences any coercion being applied by the government. See J.A. 221-226. There is no evidence in the record indicating that the government even contacted respondent Olagues. See J.A. 42-46 (Declaration of Jose J. Olagues) (expressing fear that the government might contact him). On the contrary, the record indicates that the government had no reason to contact Olagues, since the INS's records showed that he was in fact a citizen. See J.A. 68.

III. EVEN IF JUDICIAL REVIEW OF NONCOERCIVE INVESTIGATIVE ACTIVITIES IS PERMISSIBLE IN CERTAIN CIRCUMSTANCES, EQUITABLE RELIEF IS NOT AVAILABLE WHERE, AS HERE, THOSE INVESTIGATIVE ACTIVITIES WERE NOT CONDUCTED IN BAD FAITH OR FOR THE PURPOSE OF HARASSMENT, DO NOT VIOLATE ANY CLEARLY ESTABLISHED RIGHTS, AND ARE NOT DEVOID OF LEGITIMATE INVESTIGATIVE PURPOSE

Assuming, arguendo, that respondents' challenge to the manner and scope of a United States Attorney's noncoercive investigative activities presents a justiciable controversy, the court below nevertheless erred in remanding on the question of whether injunctive or declaratory relief should issue.[24] This Court has long held that state law enforcement efforts may be enjoined or declared unconstitutional only in "extraordinary circumstances," that is, where the law enforcement activities create a threat of irreparable injury that is "great and immediate," and have been conducted in bad faith or for purposes of harassment. No lesser restriction on judicial power should apply where federal criminal investigative activities are concerned. Since no such "extraordinary circumstances" can be found on the undisputed facts of this case, a remand is neither necessary nor permissible.

A. It is a " 'basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law' " and will not suffer irreparable injury if denied equitable relief (*Pennzoil Co.* v. *Texaco, Inc.*, No. 85-1798 (Apr. 6,

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[24] Specifically, the court of appeals directed the district court to determine whether Russoniello's investigation employed the least restrictive means available, whether the investigation unduly burdened respondents' fundamental right to vote, and whether the government's interest in preventing voter registration fraud outweighs respondents' First Amendment rights (Pet. App. 19a, 20a, 23a).

1987), slip op. 7, quoting *Younger* v. *Harris*, 401 U.S. 37, 43-44 (1971)). This doctrine "prevent[s] erosion of the role of the jury and avoid[s] a duplication of legal proceedings and legal sanctions where a single suit would be adequate to protect the rights asserted" (*Younger* v. *Harris*, 401 U.S. at 44). Thus, this Court has long held that "in the absence of exceptional circumstances creating a threat of irreparable injury 'both great and immediate,' a federal court must not intervene by way of either injunction or declaratory judgment" in an ongoing state criminal prosecution (*Kugler* v. *Helfant*, 421 U.S. 117, 123 (1975)). See also *Perez* v. *Ledesma*, 401 U.S. 82, 85 (1971) (equitable relief against state prosecutions is available "[o]nly in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances"); *Trainor* v. *Hernandez*, 431 U.S. 434, 446-447 (1977) (same).

While limitations on the equity power have been most frequently articulated in cases dealing with the abstention of federal courts from intervention in pending state criminal cases (see, *e.g.*, *Trainor* v. *Hernandez*, 431 U.S. at 446-447; *Kugler* v. *Helfant*, 421 U.S. at 123-125; *Younger* v. *Harris*, 401 U.S. at 43-44; *Dombrowski* v. *Pfister*, 380 U.S. 479, 482 (1965)), this Court has also recognized the importance of judicial restraint where federal courts are asked to enjoin or declare unconstitutional state law enforcement practices, even though no criminal proceedings are pending. See, *e.g.*, *City of Los Angeles* v. *Lyons*, 461 U.S. at 112; *Rizzo* v. *Goode*, 423 U.S. 362, 379 (1976); *O'Shea* v. *Littleton*, 414 U.S. at 502. Thus, in *Lyons*, the Court rejected a prayer for equitable relief against a state police department's practice of applying "chokeholds" when making arrests, noting that "a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional" (461 U.S. at 111), and that, "[i]n exercising

their equitable powers federal courts must recognize '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law'" (*id.* at 112 (citation omitted)). Likewise, in *Rizzo*, the Court held that a federal court abused its equitable discretion in directing a police department to revise its police manuals and procedures for handling complaints of minority citizens, noting that "principles of equity * * * militate heavily against the grant of an injunction except in the most extraordinary circumstances" (423 U.S. at 379), and that "'a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint'" (*id.* at 379-380 (quoting *O'Shea* v. *Littleton*, 414 U.S. at 502)).[25]

A similar restriction on the federal judiciary's exercise of its equitable powers must be recognized where federal criminal investigative activities are concerned. The separation of powers concern to protect the Executive Branch's investigative and prosecutorial authority weighs

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[25] In suggesting (Br. in Opp. 19-21) that the basic equity principles underlying this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971), do not apply where a state criminal proceeding is not pending, respondents confuse the circumstances in which federal courts must "abstain" from deciding federal questions with the circumstances in which equity principles bar federal courts from issuing equitable relief. Absent "extraordinary circumstances," a federal court must "abstain" from adjudicating *any* federal question where state proceedings that will culminate in judicial review of those claims are pending. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, No. 85-488 (June 27, 1986). In the absence of such pending proceedings, the federal court may adjudicate claims for monetary relief regardless of the circumstances (unless an immunity exists). As *Lyons*, *Rizzo* and *O'Shea* demonstrate, however, even where no state proceedings are pending, federal court may not issue injunctive or declaratory relief against law enforcement officials in the absence of "extraordinary circumstances." See *City of Los Angeles* v. *Lyons*, 461 U.S. at 112; *Rizzo* v. *Goode*, 423 U.S. at 379; *O'Shea* v. *Littleton*, 414 U.S. at 502.

heavily against the allowance of judicial challenges before any formal governmental action is taken. See *Allen* v. *Wright*, 468 U.S. at 760 (quoting *O'Shea* v. *Littleton*, 414 U.S. 488, 499 (1974)) ("[c]ase-or-controversy considerations * * * 'obviously shade into those determining whether the complaint states a sound basis for equitable relief' "); *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-106 (same). Moreover, such governmental activities are almost always less directly intrusive on the interests of those on whom the investigation touches than is a pending prosecution where charges have been filed. See *Heckler* v. *Chaney*, 470 U.S. at 832. Thus, while their reasons differ somewhat from those articulated in *Younger* and *Lyons*,[26] the lower federal courts, with the exception of the court below, have uniformly held that, to the extent they are justiciable at all, federal criminal investigative activities may be enjoined or declared unconstitutional only in the most "extraordinary circumstances." See, *e.g.*, *Reporters Committee for Freedom of the Press* v. *American Telephone & Telegraph*, 593 F.2d 1030, 1065 (D.C. Cir. 1978); *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978); *LaRouche* v. *Webster*, 566 F. Supp. 415, 417 (S.D.N.Y. 1983); see also *Pollard* v. *Roberts*, 283 F. Supp. 248, 257 (E.D. Ark.), aff'd, 393 U.S. 14 (1968); *In re Grand Jury Subpoena to Central States*, 225 F. Supp. 923, 925 (N.D. Ill. 1964). See also *North* v. *Walsh*, 656 F. Supp. 414, 423 (D.D.C. 1987) (court will

[26] The Court has held that federal court interference with state criminal prosecutions is generally inconsistent with notions of "comity" and "our Federalism" (*Younger* v. *Harris*, 401 U.S. at 44). The Court has recently made clear, however, that the "first ground for the *Younger* decision was 'the basic doctrine of equity jurisprudence that courts of equity * * * should not act to restrain a criminal prosecution[] when the moving party has an adequate remedy at law' " (*Pennzoil Co.* v. *Texaco, Inc.*, slip op. 7 (quoting *Younger* v. *Harris*, 401 U.S. at 43)). Principles of comity and federalism were a "second explanation" (slip op. 7) that only "reinforced" the "underlying reason" for judicial restraint (*Younger* v. *Harris*, 401 U.S. at 44).

not enjoin investigation by special prosecutor where plaintiff has not suffered an "injury of sufficient keenness"), appeal pending No. 87-5058 (D.C. Cir.).

B. No such "extraordinary circumstances," as defined by this Court, are presented by the facts of this case. Respondents have not shown the necessary "great and immediate" irreparable injury. Nor have they introduced any evidence showing that the investigation was conducted in "bad faith," for purposes of "harassment," or in flagrant and patent violation of express constitutional prohibitions. See *Younger* v. *Harris*, 401 U.S. at 46, 53, 54; see also *City of Los Angeles* v. *Lyons*, 461 U.S. at 112. Rather, the undisputed facts are to the contrary.

1. The injuries that respondents allege in this case simply are not "great and immediate" within the meaning of the *Younger* line of cases. Respondent Olagues is an easy case in this respect. As Judge Wallace noted in dissent (Pet. App. 29a), "the result of the investigation was to demonstrate that [respondent Olagues] is a citizen, legally registered to vote." In such circumstances, there is no reason to believe that the government will again investigate Olagues as a possible noncitizen voter (who might have information about persons or groups attempting illegally to register noncitizen voters). Accordingly, even assuming that the "stigma" and "chill" respondent Olagues alleges he has suffered by virtue of the investigation is a basis for standing to seek monetary relief, respondent Olagues has no basis at all for seeking prospective equitable relief. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-106, 111; *O'Shea* v. *Littleton*, 414 U.S. at 499-504.

The organizational respondents do not present a much more difficult case. They claim that their voter registration and education activities were undermined by the conduct of this investigation. Yet nothing in the record indicates that the investigation ever specifically focused on these organizations or subjected them (or their members) to a reasonable threat of prosecution. Accordingly,

the "chilling effect" of which the respondent organizations complain is insufficient to provide them with standing to seek any relief, monetary or equitable. See *Laird* v. *Tatum*, 408 U.S. at 13-14; *Boyle* v. *Landry*, 401 U.S. 77, 80-81 (1971); *Davis* v. *Ichord*, 442 F.2d 1207, 1214 (D.C. Cir. 1970)). Moreover, since the challenged information-gathering activities ended five years ago and cannot realistically be expected to recur, it is especially clear that the organizations lack standing to seek equitable relief. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-106, 111.

Nor can the organizational respondents rely on the special sensitivities of recently-registered foreign-born persons who apparently fear that another investigation will occur (see Pet. App. 7a-8a). "It is the *reality* of the threat of repeated injury * * *, not * * * subjective apprehensions" concerning it, that is relevant (*City of Los Angeles* v. *Lyons*, 461 U.S. at 107, n.8). Accord, *O'Shea* v. *Littleton*, 414 U.S. at 498; *Steffel* v. *Thompson*, 415 U.S. 452, 476 (1974), (Stewart, J., concurring); cf. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 778 (1983) (it is "extraordinarily difficult for agencies to differentiate between 'genuine' claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted theory"). The reality here is that the investigation is over.

In any event, even if the alleged "stigma" and "chilling effects" are injuries sufficient to provide either Olagues or the organizations with standing, they clearly do not constitute the "great and immediate" irreparable injury required by the *Younger* line of cases. The harms alleged here are no greater than the injury "incidental to every criminal proceeding brought lawfully and in good faith" (*Douglas* v. *City of Jeannette*, 319 U.S. 157, 164 (1943)); "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution[] [cannot] by themselves be considered 'irreparable' in the special legal sense of that term" (*Younger* v. *Harris*, 401 U.S. at 46)

Moreover, respondents have already been freed of any stigma of criminal wrongdoing by the termination of the investigation, and the collateral adverse effects of which respondents complain were subject to a prayer for money damages. See *City of Los Angeles* v. *Lyons*, 461 U.S. at 105-109, 111; *FTC* v. *Standard Oil Co.*, 449 U.S. at 244-245; *Younger* v. *Harris*, 401 U.S. at 46-47. Thus, the "extraordinary remedies" of injunctive or declaratory relief are simply unnecessary to remedy any injuries alleged in this case. See *Amoco Production Co.* v. *Gambell*, No. 85-1239 (Mar. 24, 1987), slip op. 9; *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311-313 (1982).

2. Furthermore, the governmental action challenged here was not conducted in bad faith, for the purpose of harassing respondents, or in flagrant disregard of respondents' rights. The undisputed facts show that the United States Attorney learned through public sources of allegations that various persons or organizations may have been conspiring fraudulently to register unqualified voters. In following up on those indications of possible criminal conduct, he naturally focused the "investigation on persons who had registered at a time that illegal registrations may have been rampant and who, if they were witnesses to criminal activity, would be more likely to recollect details than would be long-registered noncitizen voters" (Pet. App. 33a-34a). He did this by using accessible information from the voter registration form, information reflecting foreign birth, recent registration, and request for bilingual voting materials. Moreover, he terminated the investigation when it failed to produce evidence sufficient to justify further action (*id.* at 45a). Thus, there is no basis for suggesting that Russoniello engaged in any harassing or ill-motivated behavior.

That the criteria used to identify *witnesses* in some sense "targeted" persons of Chinese-American and Hispanic-American descent does not justify anticipatory judicial intervention. The Equal Protection Clause does not require prosecutors to turn a blind eye to basic

descriptive facts relevant to suspected criminal conduct or knowledge thereof. This Court has recognized that law enforcement officials may consider group characteristics and statistical profiles, including the national origin or race of suspects and witnesses, in narrowing their investigations. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975); *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986), slip op. 24 (Stevens, J., dissenting); see also *Hon Keung Kung* v. *INS*, 356 F. Supp. 571, 575 (E.D. Mo. 1973) ("common sense [dictates] that race may be a relevant factor in some circumstances in determining whether to question a person about his immigration status"). Here, preliminary information indicated that the greatest potential for voter registration fraud existed among "persons who did not speak or understand the English language" (J.A. 178). Accordingly, it was quite reasonable for Russoniello to conclude that "recently-registered voters from the Chinese-American and Hispanic-American communities were most likely to be able to furnish him with valuable information for the criminal investigation of a pattern of illegal voter registration he had reason to believe was occurring in those communities" (Pet. App. 34a-35a). Indeed, by focusing his investigation in this fashion, Russoniello was able to narrow his inquiry and avoid inconveniencing as many other persons as possible.

Even the opinion of the court below makes clear that the government officials involved in this investigation did not engage in the sort of bad faith, harassment, or other extreme behavior that arguably would establish the "extraordinary circumstances" necessary for enjoining or declaring unconstitutional the activities of a prosecutor.[27]

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[27] As noted above, this Court has held that the "extraordinary circumstances" standard applies to prayers for declaratory as well as for injunctive relief. See *Kugler* v. *Helfant*, 421 U.S. at 123-124; *Samuels* v. *Mackell*, 401 U.S. 66, 72 (1971). See also *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 930-931 (1975). Thus, while it is true that there are some cases in which declaratory but not injunctive relief may be granted (see *Steffel* v. *Thompson*, 415 U.S. 452,

The court below found that "the government has a compelling interest in preventing voter registration fraud" (Pet. App. 19a), that there was no evidence that the government intended to deny or abridge respondents' right to vote (*id.* at 21a), that respondents' suit "raise[d] issues of first impression" (*id.* at 24a), and that "the government officials did not violate [any] 'clearly establised' rights" by the conduct of their investigation (*ibid.*). In short, the court of appeals conceded that Russoniello's investigation was not conducted for purposes of harassment, did not violate any clearly established rights, and had not been shown to be without a legitimate investigative purpose. Accordingly, it should have held that the requisite "extraordinary circumstances" were absent and that neither injunctive nor declaratory relief could issue in this case.

466-473 (1974)), this clearly is not such a case. As Judge Wallace noted in his original panel opinion, respondents are not "seeking a declaration that * * * [their] voter registration activities are lawful. Rather, they seek a declaration that the government's activities are unlawful. * * * In these circumstances, * * * [d]eclaratory relief * * would raise the same concerns regarding interference with the activities of prosecuting officials [as the issuance of injunctive relief would raise]" (Pet. App. 63a-64a).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with instructions that respondents' prayers for injunctive and declaratory relief be dismissed as moot. Alternatively, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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October Term, 1986

JOSEPH P. RUSSONIELLO, *et al.*,
Petitioners,

v.

JOSE J. OLAGUES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION TO VACATE ON GROUNDS OF MOOTNESS

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MOTION TO VACATE ON GROUNDS OF MOOTNESS

In their brief on the merits, petitioners argue that the instant case is moot and that the appropriate disposition is to vacate the judgment of the court below. Respondents agree. Accordingly, respondents respectfully move this Court to vacate the judgment of the Court of Appeals below and remand the case to the District Court with a direction to dismiss the action. *United States v. Munsingwear*, 340 U.S. 36, 39 (1950). The grounds for this motion are that the case has become moot as a result of a change in California law.

PRELIMINARY STATEMENT

The governmental conduct at issue in the instant case was a voter fraud investigation carried out by the United States Attorney and local district attorneys and voting registrars in nine Bay Area counties. The means used to carry out the investigation was a review by the voting registrars of records of voters who had requested bilingual election materials, and the random selection by each registrar of 25 names of recently registered, foreign-born voters who had requested bilingual materials. These names were forwarded to the United States Attorney, who had the citizenship status of these randomly selected individuals investigated by the Immigration and Naturalization Service. Unless this record check produced positive confirmation of citizenship, such individuals were subjected to further investigation by the local district attorney or the FBI.

In the Brief For the Petitioners, petitioners argue that this case is moot. (Pet. Br. 16-22). Petitioners assert that the governmental conduct challenged by respondents ceased in 1982, and has not recurred in the intervening five years in spite of two federal elections subsequent to 1982. (Pet. Br. 18). Petitioners claim that the commencement of the investigation of bilingual voters was brought about by "unique conditions" that "no longer exist." (Pet. Br. 21). Petitioners argue that there is no reasonable likelihood that "the government would reinstitute any similar investigation," as the 1982 investigation was discontinued precisely because it was not successful in establishing evidence of voter fraud. (Pet. Br. 21). Finally, petitioners point out that, due to a change in California

law (California Government Code, § 6253.6), "it thus appears that government officials could not collect voter registration information in the same way as they did here, even if they wanted to do so." (Pet. Br. 21.) For these reasons, petitioners conclude that this case is moot, and that this Court should vacate the judgment of the court below and remand to the District Court with instructions to dismiss. (Pet. Br. 22.)

Because of the change in California law subsequent to the bilingual ballot investigation, respondents agree that this case is now moot and that the disposition urged by petitioners is appropriate. As it now appears that there is no dispute between the parties as to the question of mootness, respondents are immediately bringing this matter to the Court's attention by this motion.

THE CASE IS MOOT

Subsequent to petitioners' investigation of bilingual voters, the California Legislature amended the California Public Records Act to make it explicit that voter requests for bilingual ballots are not "public records," and to prohibit public officials from disclosing information "revealing the identity of persons who have requested bilingual ballots" to "any person other than public officers or public employees who are responsible for receiving those requests and processing the same." California Gov-

ernment Code, § 6253.6(a) (West Supp. 1987).[1] This change in the law means, as petitioners recognize (Pet. Br. 21), that petitioners could not pursue an investigation of bilingual voters in the same manner as the 1982 investigation.

Under this new statute, law enforcement officials would not be able to institute a criminal investigation of bilingual ballot requesters by simply requesting voting registrars to select at random the targets of the investigation. Rather, investigative officials would need a court order or other form of legal process to obtain this information.[2] As petitioners themselves acknowledge, under

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[1]California Government Code, 6253.6 provides:

> "(a) Notwithstanding the provisions of Sections 6252 and 6253, information compiled by public officers or public employees revealing the identity of persons who have requested bilingual ballots or ballot pamphlets, made in accordance with any federal or state law, or other data that would reveal the identity of the requester, shall not be deemed to be public records and shall not be provided to any person other than public officers or public employees who are responsible for receiving those requests and processing the same." (Underscoring omitted.)

[2]The statutory scheme underscores the mandatory nature of the legislative direction in Section 6253.6 that bilingual ballot requests "shall not" be disclosed beyond local election officials. The Public Records Act delineates a number of categories of information that are exempt from disclosure. Cal. Government Code, § 6254. Case law, however, made it clear that these exemptions were permissive only, and that agencies had the discretion to disclose the information. *See Black Panther Party v. Kehoe*, 42 Cal.App.3d 645, 656, 117 Cal.Rptr. 106, 113 (1974); *Berkeley Police Assn v. City of Berkeley*, 76 Cal.App.3d 931, 941, 143 Cal.Rptr. 255, 262 (1977). Rather than treating bilingual ballot requests as exempt under Section 6254 (thereby permitting discretionary disclosure), the Legislature enacted a mandatory prohibition against disclosure of what it deemed non-public records.

this new statute "it would be impossible for the U.S. Attorney again to conduct a similar investigation *without court approval.*" (Suggestion for Full En Banc Rehearing filed in the Court of Appeals, October 8, 1986, at p.7) (emphasis added).

This change in the law effected by the new statute pertains directly to the governmental conduct challenged in this case. Respondents have never disputed that petitioners have the authority to investigate voter fraud, or, more precisely, that they have the authority to investigate whether non-citizens are illegally voting. Rather, respondents' complaint is with the means adopted to initiate and pursue such an investigation—namely, the targeting of randomly selected Chinese-speaking and Spanish-speaking individuals solely on the basis that they have requested a bilingual ballot and without any grounds to believe that the individuals selected are involved in violations of law. Under the new law, the voting registrars are prohibited from complying with a request by the United States Attorney to provide this information absent a court order or legal process. Thus, California citizens are no longer lawfully subject to becoming the target of a criminal investigation simply as a result of being randomly selected from a list of bilingual ballot users at the request of a law enforcement official acting in his unfettered discretion.[3]

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[3]Respondents have argued, and still maintain, that a criminal investigation which targets randomly-selected Chinese and Hispanic bilingual voters based solely on their request for a bilingual ballot constitutes a violation of rights guaranteed by

(Continued on following page)

As this Court has recognized, an intervening change in the law which prevents or substantially alters the governmental action or conduct challenged in a case renders moot claims for equitable relief against such action or conduct. Thus, in reviewing a decision enjoining the Interstate Commerce Commission from prescribing the forms of carriers' bills of lading, this Court held that new legislation which modified the powers of the ICC to prescribe such bills rendered the case moot:

> The subsequent legislation necessitates the adoption of different forms of bills in the event that the power of the Commission be sustained. This legislation, having that effect, renders the case moot.

United States v. Alaska Steamship Company, 253 U.S. 113, 116 (1920); *see also, e.g., Diffenderfer v. Central Baptist Church,* 404 U.S. 412 (1972) (per curiam); *Princeton University v. Schmid,* 455 U.S. 100, 103 (1982) (per curiam).

(Continued from previous page)

the First Amendment and the Equal Protection Clause. Because the new California statute substantially affects and restricts the means that were used to conduct the 1982 bilingual voter investigation at issue in this case, vacating the judgment below on grounds of mootness is an appropriate disposition of this case. However, if this Court determines that the case is not moot because of the likelihood of a recurring bilingual voter investigation, respondents are entitled to equitable relief. A discriminatory investigation against persons and groups exercising fundamental voting rights constitutes sufficient "extraordinary circumstances" and irreparable injury to warrant equitable intervention by a federal court.

The instant case thus goes beyond "voluntary cessation" of a course of action by government officials. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953). Rather, the change in the law prevents petitioners from being able to use in the future the same method used to conduct the 1982 investigation that was challenged by respondents in this case. Thus, the effect of the new statute is to vitiate any "reasonable expectation" that the respondents will again be subject to the same type of investigation instituted by a law enforcement official acting in his unfettered discretion. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).[4]

Respondents recognize that the appropriate disposition of a moot case is that the judgment below is vacated and the case remanded with a direction to dismiss. *United States v. Munsingwear*, 340 U.S. at 39. As petitioners and respondents thus agree that the case is moot and that the judgment below should be vacated, this "case has therefore lost its character as a present, live controversy ...." *Hall v. Beals*, 396 U.S. 45, 48 (1969).

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[4]In its en banc decision, the Court of Appeals ruled that the case was not moot because "Russoniello continues to have available to him the necessary bilingual ballot lists to conduct a voter registration investigation similar to the one challenged here." (Pet. App. 9a). Due to the change in California law, however, these "necessary bilingual ballot lists" are no longer "available to him" pursuant to an investigation "similar to the one challenged here."

CONCLUSION

For these reasons, respondents respectfully move this Court to vacate the judgment of the Court of Appeals and remand this case to the District Court with instructions to dismiss the action.

Respectfully submitted,

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OCTOBER TERM, 1987

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JOSE J. OLAGUES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR PETITIONERS IN RESPONSE TO RESPONDENTS' MOTION TO VACATE ON GROUNDS OF MOOTNESS

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On April 20, 1987, the Court granted our petition for a writ of certiorari and, in addition, invited the parties to brief whether the court below was correct in holding that the case was not moot. On July 2, 1987, we filed our brief on the merits.

Respondents have not yet filed their brief on the merits. They have instead filed a motion with this Court arguing that the case is moot and that the judgment of the court below should be vacated and remanded with instructions that the district court be directed to dismiss the prayers for injunctive and declaratory relief. As explained in our brief on the merits (at 16-22), we agree with respondents' conclusion, though our reasons for finding that this case is moot are substantially different.

Respectfully submitted.

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No. 86-1217

In The
Supreme Court of the United States
October Term, 1986

JOSEPH P. RUSSONIELLO, *et al.*,
Petitioners,
v.
JOSE J. OLAGUES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

This amicus curiae brief of Pacific Legal Foundation is respectfully made pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for petitioners and respondents; these letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated under the laws of California

for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board of Trustees composed of concerned citizens the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of an amicus curiae brief in this matter.

The ability of the United States Attorneys to effectively investigate voter fraud in particular, and crime in general, is a great concern to Pacific Legal Foundation's members and supporters. Pacific Legal Foundation's public policy perspective and litigation experience will help provide this Court with additional arguments relevant to the erroneous holding of the Ninth Circuit Court of Appeals in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 797 F.2d 1511 (9th Cir. 1986) (en banc).

STATEMENT OF THE CASE

Petitioner, Joseph P. Russoniello, is the United States Attorney for the Northern District of California and petitioner, David Ilchert, is the District Director of the United

States Immigration and Naturalization Service (INS) in San Francisco. In March of 1982, Russoniello received information from the Santa Clara district attorney which indicated that a number of foreign-born persons who were not United States citizens had recently registered to vote in that county. Russoniello was also told that many of these noncitizen registrants were not fluent in English and many were told by persons registering them that they were eligible to vote.

Russoniello requested that the district attorneys and voter registrars in nine counties in the San Francisco Bay Area assist him in investigating the extent of noncitizen voter registration. Specifically, he asked the voter registrars to randomly select and submit to him the names of 25 recently registered, foreign-born voters who had requested bilingual ballots. After receiving those names, he forwarded them to the INS for verification of the registrants' citizenship status. Russoniello also suggested to the district attorneys that they contact those registrants who could not be positively identified as citizens by the INS to determine whether they were citizens. He also suggested that the district attorneys seek to determine who encouraged the noncitizens, if any, to register illegally. He stated that he did not intend to prosecute any of the noncitizen registrants, but he would seriously consider prosecuting any group or individual who had deliberately conspired to register noncitizens in violation of 42 U.S.C. § 1973i(c).

The voter registrars submitted 168 names to Russoniello of which the INS determined that 55 were

citizens, 45 were not or probably were not citizens, and concerning 68, the INS had no records to help determine whether they were citizens. Russoniello conveyed the information to the district attorneys and suggested they interview any registrant who was not identified by the INS as a citizen. The interviews were by letter or other noncustodial contact. After receiving the information Russoniello ended the investigation and chose not to prosecute anyone.

Respondents, an Hispanic-American who was selected for investigation and several organizations that promote the voting of Chinese and Hispanic-Americans in the San Francisco Bay Area, filed this class action against the federal and state officials in the investigation. Respondents sought injunctive, declaratory, and monetary relief and claimed the investigation violated equal protection, substantive due process, the Voting Rights Act in 42 U.S.C. § 1973b(f)(2), and the First Amendment.

The District Court dismissed respondents' request for injunctive relief on the ground that the court has no jurisdiction to enjoin an investigation. The court also granted petitioners' motion for summary judgment on all counts. The Ninth Circuit Court of Appeals affirmed the decision and stated that the District Court did have jurisdiction but that separation of powers principles demand that a court not enjoin an investigation in the absence of extraordinary circumstances.

On a rehearing en banc in the Ninth Circuit, the court reversed in part. The court held that injunctive relief may be proper. In regard to the Equal Protection and Due Process Clauses claims, the court stated that foreign-born,

recently registered to vote, requesters of bilingual ballots formed a suspect classification. The court remanded these issues back to the District Court to determine whether the investigation pursuant to that classification was necessary. The Ninth Circuit upheld the grant of summary judgment on the Voting Rights Act because of the lack of any evidence to show that petitioners intended to deny or abridge respondents' right to vote. The court also held that damages pursuant to 42 U.S.C. § 1983 are unavailable because petitioners are entitled to good faith immunity. On the First Amendment claim, the court remanded the case back to the District Court.

Petitioners petitioned this Court for a writ of certiorari. The petition was granted on April 20, 1987.

SUMMARY OF ARGUMENT

The Ninth Circuit realized that the investigation was conducted in good faith. That fact in addition to the lack of any coercive actions in the investigations renders this case unreviewable due to separation of powers principles. Since the judiciary normally may not review a decision whether or not to prosecute, the courts have no authority to review the less intrusive decision whether or not to investigate.

Even if the judiciary could adjudicate the respondents' claims, the Ninth Circuit's creation of a new suspect class is erroneous. Language is not a suspect classification. Moreover, the decision to investigate was

based on the fact that recently registered, foreign-born requesters of bilingual ballots are more likely to be illegally registered than any other group of people, not because of any stereotypical notions which have no basis in fact. Moreover, the application of a First Amendment analysis to the investigation of organizations establishes an incentive for criminal activity to be cloaked in the protection afforded to groups. The Ninth Circuit's holding gives dangerously new meaning to the adage, "there is safety in numbers."

ARGUMENT

I

FEDERAL COURTS DO NOT HAVE AUTHORITY TO ENJOIN A PREINDICTMENT CRIMINAL INVESTIGATION BY UNITED STATES ATTORNEYS IN THE ABSENCE OF EVIDENCE OF BAD FAITH OR COERCIVE TACTICS

Far beyond dispute is the truth that the Constitution divides the federal government into three separate branches, the legislative, executive, and judicial, and was intended to do so. *See Immigration and Naturalization Service v. Chadha,* 462 U.S. 919, 951 (1983). Even though the branches are not "hermetically sealed," interference by one branch into the affairs of another should be rarely indulged. *Buckley v. Valeo,* 424 U.S. 1, 121 (1976). The purpose of the separation of powers grew out of the political theory that diffused government power provides better security for liberty than centralized power. *See*

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), *quoted in Bowsher v. Synar*, — U.S. —, 92 L. Ed. 2d 583, 593 (1986).

The evil of interference by the Legislature into the operations of the executive branch recognized in *Chadha* and *Bowsher* is no more significant than an intrusion by the judiciary into either of the other two branches. Article III of the Constitution which outlines the judicial power of federal courts does not contemplate judicial supervision of everyday operations of the executive branch. Indeed, many executive branch functions are unreviewable. *See, e.g., Goldwater v. Carter*, 444 U.S. 996 (1979) (Rehnquist, J., concurring) (presidential abrogation of a treaty); *Ex parte Grossman*, 267 U.S. 87 (1925) (courts cannot inquire into the rationale for a presidential pardon); *Keim v. United States*, 177 U.S. 293 (1900) (appointment of executive officials); *Monarch Insurance Company of Ohio v. District of Columbia*, 353 F. Supp. 1249 (D.D.C. 1973), *aff'd*, 497 F.2d 684 (D.C. Cir.), *cert. denied*, 419 U.S. 1021 (1974) (decision to use troops to quell civil disorder); *United States v. Marchetti*, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972) (operations of the Central Intelligence Agency); *Velvel v. Johnson*, 287 F. Supp. 846 (D.C. Kan. 1968), *aff'd*, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970) (participation in Vietnam War without congressional declaration); *Ex parte Hitz*, 111 U.S. 766 (1984) (status of person as foreign representative); *United States v. Klintock*, 5 U.S. (5 Wheat.) 144 (1820) (recognition of foreign governments); *United States v. Holliday*, 3 U.S. (3 Wall.) 407 (1852) (status of Indian tribes); *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923) (duration of hostilities).

Investigations by the United States Attorney which are within the scope of the authority of that office are actions of the executive branch. "Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder,* 442 U.S. 114, 124 (1979). *See also Bordenkicher v. Hayes,* 434 U.S. 357, 364 (1978); *Linda R. S. v. Richard D.,* 410 U.S. 614, 619 (1973). The protection of prosecutorial discretion from judicial interference exists because of the prosecutor's position in the executive branch. *United States v. Nixon,* 418 U.S. 683, 693 (1974). Since the decision whether to prosecute is unreviewable, the decision whether to investigate, a subordinate function in both time and intrusiveness, is generally unreviewable as well.[1]

In *Laird v. Tatum,* 408 U.S. 1 (1972), plaintiffs challenged the Army's surveillance and intelligence gathering of civilian political activities. This Court rejected the

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[1] The Ninth Circuit's citation of *Jett v. Castaneda,* 578 F.2d 842, 845 (9th Cir. 1978), for the proposition that a District Court has jurisdiction to enjoin illegal conduct by a prosecutor is surprising. 797 F.2d at 1519. In *Jett,* the court came to the opposite conclusion.

> "Nowhere in the Constitution or in the federal statutes has the judicial branch been given power to monitor executive investigations before a case or controversy arises. Without an indictment or other charge bringing a defendant before the court, or in the absence of a pending grand jury investigation, a district court has no general supervisory jurisdiction over the course of executive investigations." 578 F.2d at 845.

The court also noted that, although the United States Attorney has control over the investigation, many remedies are available to a defendant *after* indictment.

Court of Appeals' assumption that it could restrict the Army's activities to only those which were necessary. "Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; . . . it is not the role of the judiciary, absent actual present or immediately threatened injury resulting from unlawful governmental action." *Id.* at 15.

However, this is not to say that prosecutors may ignore the various provisions of the Constitution in the course of an investigation. Constitutional challenges to specific coercive *methods* of investigation can and should be considered by the courts. Examples may include placing individuals in custody without the protections of the Bill of Rights or extraction of information by torture. Such methods cannot be condoned or ignored by the courts merely because of the lack of an indictment. But respondents are not challenging the methods of investigation. They challenge the decision to investigate itself.

Even the Ninth Circuit realized that the investigation was in good faith for such was the basis for its finding that the respondents cannot collect money damages against petitioners. *Olagues v. Russoniello,* 797 F.2d at 1523. Also, there is no evidence that the defendants engaged in the investigation with an intent to deny or abridge the respondents' right to vote. *Id.* at 1522. Courts must refuse to enjoin an investigation in the absence of bad faith or coercive activities. The Ninth Circuit recognized that all parties "concede that the government has a compelling interest in preventing voter registration fraud." *Id.* at 1521. The court erred by requiring that the investigation

must be proved by the government to have been "necessary." *Id.*

The requirement that an investigation be proved to be necessary is not a mere theoretical intrustion into the United States Attorneys' duties. Such a requirement will certainly hinder investigations which are by nature searches for a basis to take the official step of seeking an indictment. A vicious circle is imposed by the Ninth Circuit if the prosecutor must justify and establish necessity prior to the initiation of an investigation. The result is that United States Attorneys must wait for someone else to conduct an investigation to bring to light the facts which demonstrate that further investigation is necessary or the seeking of an indictment should ensue. The federal courts were never intended to be monitors of every decision of the executive branch.

II

THE PETITIONERS DID NOT CLASSIFY PEOPLE ON THE BASIS OF A SUSPECT CLASSIFICATION

The Ninth Circuit held that the "three characteristics, *i.e.*, foreign-born voter, recently registered voter, and bilingual ballot voter taken together in the instant case form a suspect classification based on race and national origin." 797 F.2d at 1521. This holding is erroneous.

In its attempt to create this new suspect classification, the Ninth Circuit rushes too quickly through its own analysis. The court stated that the "traditional indicia of a suspect classification is whether the class is 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of

political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Id.* at 1520 (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973)). The Court also quotes 42 U.S.C. § 1973b(f)(i) which requires bilingual ballots. Thus, it appears that non-English speaking people are not politically powerless since Congress has enacted legislation designed specifically to protect their interests.

The court concludes that Chinese and Hispanics have historically been treated in a discriminatory manner. 797 F.2d at 1521 (citing *Hernandez v. Texas*, 347 U.S. 475 (1954); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)). This conclusion is no different than the fact that race is a suspect classification. However, the class was not a racial class, but a narrower class composed of three elements which included language choice.

The court attempted to distinguish the many cases which hold that language does not form a suspect classification[2] by noting that those cases involved English versus non-English speaking individuals whereas this case involves a specific classification of Spanish-speaking and Chinese-speaking immigrants. 797 F.2d at 1521. All of the cases cited involved an English language preference. All of the

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2 *See, e.g., Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) (English-only social security notices do not violate Spanish-speaking claimants' rights); *Frontera v. Sindell*, 522 F.2d 1215, 1219-20 (6th Cir. 1975) (English-only civil service exams do not violate Hispanics' rights); *Garcia v. Gloor*, 618 F.2d 264, 271 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (employer's English-only rule does not violate Title VII or Section 1981); *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978) (no right to bilingual education).

cases, as the present one, involved a general burden on *all other* language speakers, but a *practical effect* of burdening a specific language group. Russoniello investigated requesters of bilingual ballots, not Spanish and Chinese speaking individuals. The "burden" was on requesters of any non-English ballots, but incidentally the only non-English ballots were in Spanish and Chinese. There is no evidence of any animus against Chinese or Spanish-speaking people. If ballots were printed in Russian, Polish, French, German, or Bantu, there is no reason to suspect that requesters of those ballots would be treated any differently than the respondents.

The court also notes immutability as a factor demonstrating a suspect classification. 797 F.2d at 1520. But it fails to note that the classification in this case is not immutable. Members of the "classification" can cease to be members by using English ballots and no longer requesting bilingual ballots. The burden to withdraw from the class by this method may be difficult, but not impossible. More importantly, people also cease to be members of the class by simple operation of time. Only *recently registered* voters are members of the class. People are members of the class for only a short period of time.

Moreover, even if the classification were based on race, the investigation is not necessarily suspect. The Equal Protection Clause does not demand " 'things which are different in fact . . . to be treated in law as though they were the same.' " *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). Men and women can be treated differently by statutory rape laws because women in fact suffer different consequences of the prohibited activity. *See Michael M. v.*

Superior Court, 450 U.S. 464 (1981). The Court in *Graham v. Richardson,* 403 U.S. 365, 372 (1971), held that classifications based on alienage are inherently suspect. However, the Court also stated that a state need only a rational basis for excluding aliens from its police force and its schools' faculties. *Foley v. Connelie,* 435 U.S. 291 (1978); *Ambach v. Norwich,* 441 U.S. 68, 80 (1979). Aliens are less likely than citizens to have the necessary understanding of American government for those occupations.

These cases demonstrate that treating people differently because they are different does not raise the specter of a suspect classification. Likewise, the investigation of foreign-born requesters of bilingual ballots is different in fact. There is no possibility that native Americans were not citizens. Also, there is a greater likelihood that requesters of bilingual ballots would be confused about their right to vote than those who are fluent in English. Those who have difficulty with the English language are *in fact* more susceptible to being misled about voting than others. However, respondents would require a futile random sampling of all voters for investigation, if any investigation of voter fraud is to be done at all.

If an investigator received information that an eyewitness saw an East Indian female wearing the dress distinctive to her national origin and religion involved in a crime, a requirement that the investigation not consider race, national origin, religion, or gender unless absolutely necessary would be ridiculous. The application of the strict scrutiny test in this context makes no sense. Why should the investigator investigate everyone and ignore information which could narrow the class of people subject to the investigation? By analogy in the present case, Russoniello had information that non-English speakers

were improperly registered to vote. Even under respondents' argument Russoniello could have taken a random sampling of all voters since no classification, suspect or otherwise, would be used. Requiring that Russoniello ignore the information that people not fluent in English were illegally registered is equally ridiculous.

III

THE RESPONDENTS' FIRST AMENDMENT RIGHTS WERE NOT VIOLATED

The organizational respondents claim the investigation unconstitutionally interfered with their First Amendment rights of association and political expression. Specifically, they claim that participation in the organizations dropped off because those organizations were under investigation.

This Court has heard similar arguments before. In *Laird v. Tatum,* 408 U.S. 1, plaintiffs sought injunctive relief against the Army's surveillance of civilian political activity. Plaintiffs claimed the investigation had an unconstitutional "chilling" effect on First Amendment rights. *Id.* at 13. This Court found no judicially cognizable injury.

The Ninth Circuit attempted to distinguish *Laird* by stating that the plaintiffs in that case were not the *targets* of the investigation, as the respondents in this case were. 797 F.2d at 1523 n.11. However, this Court never stated that the *Laird* plaintiffs were not the targets. Instead, it appears this Court did not consider an investigation alone to be a judicially cognizable injury. Indeed, the dissenting opinion of Justice Douglas makes clear that "[r]espondents were targets of the Army's surveillance." *Laird v. Tatum,* 408 U.S. at 26 (Douglas, J., dissenting).

In *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co.,* 593 F.2d 1030

(D.C. Cir. 1978), *cert. denied,* 440 U.S. 949 (1979), the court considered the chilling effect of the unannounced release of journalists' long distance telephone billing records to law enforcement officials. "Not every Government action that affects, has an impact on, or indeed inhibits First Amendment activity constitutes the kind of 'abridgment' condemned by the First Amendment. . . . The constrictive impact must arise from the present or future exercise, or threatened exercise of, *coercive power.*" 593 F.2d at 1052 (emphasis added). Nothing about petitioners' investigation could be considered coercive.

Respondents' argument if accepted would create a strong incentive for criminal activity to be cloaked in associational rights. The use of associations or clubs would be the criminal's favorite tool because an investigator could be forced to justify in court on a compelling state interest standard a decision to investigate merely because the target was not an individual, but a group of individuals. The crime of conspiracy becomes a shelter, not from prosecution, but from investigation. The Ninth Circuit's rule that a good faith investigation of groups of people implicates First Amendment rights would turn criminal law on its head.

If, however, there existed bad faith or some animosity to the associations as associations, an investigation with no purpose other than to "chill" the membership should be subject to review in the courts. Unlike that scenario, the present case involved a good faith investigation which may or may not have had incidental effects on the organizations' memberships. Incidental, unintended effects should not give rise to a shield from investigation.

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CONCLUSION

The Ninth Circuit's holding goes beyond the pale of the power of the judiciary over the executive branch and, as a practical matter, unnecessarily hinders the investigation of criminal activity. The fundamental principles of separation of powers demand that the judiciary not interfere with executive good faith decisions to investigate in a noncoercive manner, such as the decision challenged in the present case.

Moreover, the decision to investigate should not be subject to strict scrutiny. The investigation did not classify people on the basis of a suspect classification, but on the basis of those who were most likely to be unwilling participants in illegal activity. Furthermore, the claim of infringement of associational rights, if allowed to be maintained, creates protection for criminal activity from investigation because of a group status. Organized crime would be protected because it is an organization. Amicus therefore urges the Court to reverse the erroneous holding of the Ninth Circuit.

DATED: July, 1987.

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IN THE

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OCTOBER TERM, 1986

JOSEPH P. RUSSONIELLO, *et al.*,
Petitioners,

v.

JOSE J. OLAGUES, *et al.*,
Respondents.

On a Writ of Certiorari to the Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE FEDERATION FOR AMERICAN IMMIGRATION REFORM AND IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the termination of the investigation in this case for lack of prosecutorial merit renders moot respondents' prayers for injunctive and declaratory relief.

2. Whether a federal court may, consistent with Article III of the Constitution, consider a pre-indictment challenge to the manner and scope of noncoercive investigatory activities by a United States Attorney.

3. Whether, assuming that Article III in some circumstances allows for pre-indictment judicial review of the manner and scope of noncoercive investigatory activities by a United States Attorney, a federal court may enjoin or declare unconstitutional such activities when those activities were not taken in bad faith or for purposes of harassment, do not violate any clearly established rights, and have not been shown to be devoid of legitimate investigatory purpose.

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In The

Supreme Court of the United States

October Term, 1986

No. 86-1217

Joseph P. Russoniello, *et al.*,
Petitioners

v.

Jose J. Olagues, *et al.*,
Respondents

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE
FEDERATION FOR AMERICAN IMMIGRATION REFORM
and the
IMMIGRATION REFORM LAW INSTITUTE
IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

The Federation for American Immigration Reform (FAIR) is a nonprofit membership corporation founded in 1978 for the purpose of educating the general public concerning the economic, social, environmental, demographic and other effects of immigration into the United States. FAIR seeks, *inter alia,* to enhance the ability of the United States to preserve the meaning and value of United States citizenship by ensuring that non-citizens do not, by malfeasance and fraud, exert rights properly reserved for citizens. The outcome of this case may influence the ability of the government to ensure the integrity of the voter registration process.

The Immigration Reform Law Institute (IRLI) is a non-profit public interest law firm and educational corporation founded in 1986, *inter alia,* to educate interested members of the legal profession on the nature of and the policy considerations underlying U.S. immigration and naturalization law. IRLI seeks to ensure that important distinctions between United States citizens and other persons are maintained.

Accordingly, FAIR and IRLI take this opportunity to express to the court their views on the issues presented in this case. In accordance with S.C.R. 36, both parties have consented in writing to the submission of this brief.

STATEMENT OF CONTEXT

This case, at its heart, deals with voter fraud by non-citizens and the means available to prevent such fraud.

The problem of voter fraud by aliens is not limited to the circumstances in this case. Voter fraud by non-citizens is wide-spread.

In light of the repeated and widespread reports of voter fraud by aliens, government officials have attempted to determine whether such proscribed practices occur in their jurisdictions. This case comes before this Court as a challenge to one of those investigations. Whether or not this case is moot on the facts, voter fraud by non-citizens has occurred in many parts of the country and, given increasing pressures and reduced opportunities for migration worldwide, undoubtedly will occur again as aliens learn that voting receipts and records can be used as identification.

Investigations similar to those at issue here have raised serious questions concerning the number of ineligible aliens who have sought voter registration cards as a form of documentation, *See e.g.*, "Officials Unsure Of Alien Voter Numbers," *McAllen Monitor*, April 20, 1987, at 4A, col. 5. In the few instances where it has been investigated, authorities have found that voter registration fraud by unauthorized aliens is significant. *See e.g.*, "Authorities Say Illegal Aliens Vote In Elections," *Longview Morning Journal*, April 21, 1987, at 1, col. 5; "Vast Alien Fraud Detailed By State," *Chicago Sun-Times*, April 9, 1982, at 5, col. 1 (details investigation by Illinois State Attorney General Ty Fahner).

In other instances, fraudulent voting by ineligible aliens has been alleged to influence the outcome of an election. *See e.g., Whitis v. Gonzales*, Case No. 87-16624 (63rd Judicial District Court of Val Verde Coun-

ty, Texas) (Final Judgment filed May 18, 1987) (allegations by defeated Mayor Herb Whitis that Sergio Gonzalez's 34-vote victory for Mayor of Del Rio, Texas was influenced by the votes of ineligible non-citizens).

Congress is concerned about document fraud, as evidenced by the Immigration Reform and Control Act of 1986, ("IRCA") Pub.L.No. 99-603, 100 Stat. 3359, §§ 101(e)(verifying Social Security cards), (f) (stopping counterfeit Social Security cards), and 103, (amending 18 U.S.C. § 1546, concerning fraud and misuse of documents), and various provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1101 *et seq.* (1986). Congress passed the IRCA "to effectively control unauthorized immigration to the United States." Committee of Conference, Joint Explanatory Statement on Immigration Reform and Control Act of 1986, 99th Cong., 2d Sess., H. Rpt. 99-1000, 85 (1986). Aliens use fraudulent documents to obtain benefits to which they are not entitled. *Newton v. INS*, 736 F.2d 336, 339 (6th Cir. 1984). *See also*, "Birth Papers Aid Alien Fraud," *San Antonio Express-News*, November 11, 1984, at C-1, col. 1; "Chasing the Bad Paper at the Borders," *New York Times*, June 9, 1985, at 4, col. 3.

As opportunities for illegal immigration become more difficult under the IRCA, more illegal immigrants may attempt to use document fraud to enter or remain in the United States. To try to combat document fraud, Congress raised penalties for immigration-related fraud. IRCA § 103 (amends 18 U.S.C. § 1546 to increase penalties for fraud and misuse of visas, permits, and other documents). *See also* Immigration Marriage Fraud Amendments of 1986, Pub.L.No. 99-639, 99 Stat. , Act of Nov. 10, 1987 (amends 8 U.S.C. §

1182(a)(19) to exclude aliens who seek benefits by fraud).

Moreover, it is a crime to make a false claim of citizenship or to register fraudulently to vote. 18 U.S.C. § 911 (1986); 42 U.S.C. § 1973i(c) (1986).

Pressure on American immigration laws is increasing. Although Congress last year passed the IRCA, the problem of illegal immigration remains troublesome. In 1965, the Immigration and Naturalization Service (INS) apprehended only 110,371 aliens who were unlawfully present in the United States. U.S. Department of Justice, 1983, Statistical Yearbook of the Immigration and Naturalization Service, *Aliens Apprehended, Aliens Deported and Aliens Required to Depart, Fiscal Years 1982- 1983* (ENF 1.1). For the fiscal years 1983 to 1985, the INS reports that over three million aliens were apprehended and either deported or required to depart the country. *Id.* (Total for 1983: 1,251,357.) After a brief drop in apprehensions of aliens attempting to cross our borders illegally, the number of illegal immigrants apprehended by the INS is rising once again toward a record rate. McDonnell, "Surge in Arrests of Aliens Reported," *Los Angeles Times*, San Diego County Ed., July 3, 1987, at I-35, col.1.

The increasing number of immigrants will also affect laws concerned with language, such as the federal law requiring bilingual ballots. 42 U.S.C. § 1973aa. The countries from which most immigrants originate have changed over the last thirty years. For the decade 1951-1960, an average of 32 percent of immigrants ar-

rived from English-speaking countries. U.S. Department of Justice, 1980, Statistical Yearbook of the Immigration and Naturalization Service, *Immigration by Country for Decades 1820-1980*, (Table 1). By 1984, only 17 percent of all legal immigrants came from English-speaking countries. U.S. Department of Justice, 1983, Statistical Yearbook of the Immigration and Naturalization Service, *Immigrants Admitted By Classes Under The Immigration Laws and Country or Region of Birth, Fiscal Year 1984,* (IMM 2.3). As the Ninth Circuit decision below recognized, and Respondents concede, the government's interest in protecting the integrity of the franchise from voter registration fraud is a compelling one. *Olagues v. Russoniello*, 797 F.2d 1511, 1521 (9th Cir. 1986) (en banc) (hereinafter *Russoniello). See Dunn v. Blumstein*, 405 U.S. 330, 345 (1972) (hereinafter *Blumstein*).

There are few more compelling state interests than those which ensure that each person who properly exercises his right to vote has that vote properly counted against only all other eligible voters. Voter fraud improperly dilutes votes and skews election results. Protection of the franchise, so long as investigations are lawfully conducted within reasonable bounds, is not only permissible, it is required. It is an interest that goes to the very heart of consensual republican democracy.

SUMMARY OF ARGUMENT

The classification of "recently registered, foreign-born voters requesting bilingual ballots" is not a constitutional suspect class. The class does not fall under the traditionally- defined suspect classes of race, color, or national origin. Instead, the Ninth Circuit has con-

structed a class based upon three characteristics which, each standing alone, do not come close to being equivalent to a suspect class. Nor do the three characteristics combined constitute the elements of a suspect class.

This Court should not permit a classification of "foreign born" to become synonymous with "national origin" classifications. Such a classification will wreak havoc with alienage classifications in various federal laws.

Even assuming, *arguendo,* that a "foreign-born, bilingual ballot" suspect class exists, the actions of the U.S. Attorney can survive strict scrutiny because they were narrowly tailored to serve the compelling state interest of enforcing voter fraud statutes. The U.S. Attorney's investigation was conducted to determine the very elements of a criminal offense; to eliminate investigations of "foreign-born, bilingual ballot" voters will eliminate investigations of non-citizen voter fraud.

I. THE CLASS DEFINED BELOW IS NOT A SUSPECT CLASS BECAUSE IT IS DEFINED BY LANGUAGE, NOT RACE, COLOR OR NATIONAL ORIGIN, NOR SHOULD IT BE A SUSPECT CLASS.

If this Court allows the decision of the Ninth Circuit to stand, a new suspect classification would be established for the "foreign-born, recently-registered bilingual voter." The new classification would become a functional equivalent of the "national origin" classification. A new "foreign-born" classification would be a

serious threat to statutory classifications of alienage in a variety of federal laws, including the immigration laws.

A suspect class is a class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). *See United States v. Carolene Products Co.*, 304 U.S. 144, 152-3, n. 4 (1938).

These principles are true for classifications resulting from state action examined under the Equal Protection Clause of the 14th Amendment, as well as those examined under the Fifth Amendment. *Plyler v. Doe*, 457 U.S. 202 (1982).

Often such scrutiny is indicated by an "immutable characteristic", such as skin color or race. *Frontiero v. Richardson*, 411 U.S. 677 (1973). An immutable characteristic is present with respect to each class held by this Court to be suspect: race, *Loving v. Virginia*, 388 U.S. 1 (1967); national ancestry, *Hernandez v. Texas*, 347 U.S. 475 (1954); and, with respect to state classifications inconsistent with federal alienage classifications, legal alienage, *Graham v. Richardson*, 403 U.S. 365 (1971); *see also In re Griffiths*, 413 U.S. 717 (1973); *De Canas v. Bica*, 424 U.S. 351 (1976).

With respect to action by the federal government, the Supreme Court has held that the treatment of alienage classifications are given much broader latitude, owing to the broad federal power over immigration. U.S. CONST. art. I, § 8, cl. 4; *see Takahashi*

v. Fish and Game Comm'n. 334 U.S. 410 (1948). The Court has rejected entirely the claim that "illegal aliens" constitute a suspect class. *Plyler*, 457 U.S. at 219, n. 19.

Such suspect classifications tend to "reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective." *Plyler*, 457 U.S. at 216, n. 14. Suspect classifications are often irrelevant to any legitimate governmental goal. *See McLaughlin v. Florida*, 379 U.S. 184 (1964); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

In the instant case, the court below determined that the suspect class was "recently registered, foreign-born voters who requested bilingual ballots" and that the class possessed the traditional indicia of a suspect class based on race and national origin. *Russoniello*, 797 F.2d at 1521.

The court in *Russoniello* viewed the investigation here as targeting a class based on race and national origin. *Russoniello*, 797 F.2d at 1521. Although the investigation was targeted to review bilingual ballot requesters generally, in fact Chinese and Spanish bilingual ballots are targeted. According to the Court:

> Thus, while a non-English-speaking classification is facially neutral with respect to ethnic group classification, the classification challenged here is not because for all practical purposes it is a language classification based on race and national origin.

Russoniello, 979 F.2d at 1521.

This is an incorrect analysis of the standards to find an Equal Protection violation. To find impermissible language classifications, the Court must find an intent to discriminate on the basis of race, national origin or color. *Russoniello,* 797 F.2d at 1528 (Wallace, J., dissenting); *cf. Washington v. Davis*, 426 U.S. 229 (1976)(effect rather than intent). Standing alone, language characteristics do not constitute the parameters of a suspect class. *Frontera v. Sindell,* 522 F.2d 1215, 1219-20 (6th Cir. 1975). Moreover, unlike race, language cannot be viewed as the functional equivalent of national origin discrimination. *Cf. St. Francis College v. Al-Khazraji (Majid Ghaidan)* ___ U.S. ____, 107 S.Ct. 2022 (1987) ("races" under 42 U.S.C. § 1981 include Swedes, Germans, Greeks, Norwegians, Italians, etc.); *see Soberal-Perez v. Heckler,* 717 F.2d 36, 41 (2nd Cir. 1983), *cert. denied,* 466 U.S. 929 (1984).

These classifications are also presumptively invidious if they impinge upon the exercise of a fundamental right. *Blumstein, supra*. The interests at issue here are the right to register to vote, to request bilingual ballots and to vote.

Under Article I of the U.S. Constitution, the "right to vote, per se, is not a constitutionally protected right." *Rodriguez*, 411 U.S. at 35, n. 78. At most, individuals are entitled to "equal treatment in the voting process." *Id.* at 34, n. 74. "In other words, the right to vote is accorded extraordinary treatment because it is, in equal protection terms, an extraordinary right: a *citizen* cannot hope to achieve any meaningful degree of individual political equality if granted an inferior right of participation in the political process." *Plyler*,

457 U.S. at 233 (Blackmun, J., concurring) (emphasis added).

Under *Hirabayashi, supra*, and similar cases, government action against suspect classes is unlawfully discriminatory if it is without reference to any legitimate and compelling governmental objective. Here, however, Russoniello sought to further a legitimate and compelling governmental objective: the prevention of voter fraud. Russoniello's efforts to prevent voter fraud were, in fact, motivated by laws designed to prevent an inferior right of participation in the political process; no citizen's vote should be diluted by the votes of non- citizens.

In fact, the classifications employed here are only logical given the disparate treatment of voters under Federal law. The Voting Rights Act of 1965, codified at 42 U.S.C. § 1973, creates new requirements for jurisdictions that possess at least five percent of a population of persons whose principal language is other than English. 42 U.S.C. § 1973aa-1a(c). In these instances, the affected California counties provided bilingual ballots to eligible voters who requested them. Pet. App. 3a.

Theoretically, when this case was filed, the State of California and its political subdivisions were at liberty to provide bilingual ballots to as many different groups in as many different languages as there are diverse voters. As Respondents point out, passage of California's Proposition 63 may substantially curtail the use of multilingual ballots not required by federal law. Br. in Opp. 12-13, n. 8; CAL. CONST. art. III, § 6.

Nor was this a case in which special measures were undertaken to burden a particular group in the course of preventing voter fraud. The investigation was a routine pre-indictment, non-intrusive examination of voter and immigration records maintained by the county and federal governments, respectively, with none of the hallmarks of unlawful discrimination.

Russoniello's investigation was not designed to investigate a particular national origin class. He sought simply to examine the integrity of the registration procedures of those who most likely might be non-citizens. Since federal law requires some bilingual ballots, persons requesting such ballots cannot be presumed to be non-citizens. Non-citizens, however, are probably more likely to require non-English-language materials. *See* P. 16-17 *infra.* Applicants for naturalization are required to demonstrate a minimal understanding of English. 8 U.S.C. § 1423. A list of foreign-born persons requesting bilingual ballots could logically be a starting point for a determination of persons who statistically could be non-citizens erroneously registered. *See* P. 16-17 *infra.*

Nor are the particular languages spoken in the affected counties a valid guide to determine if inappropriate selection criteria were used. Chinese and Spanish-speaking persons predominated in the affected counties; therefore, under applicable federal law, bilingual registration forms were available in those languages. Pet. App. 3a. The investigation of these two language groups, as a consequence of geography, does not equate to discrimination based on national origin.

The most important policy question underlying this "suspect class," however, is the effect of a new suspect

classification. If this Court allows the lower court decision to stand, a "foreign-born, bilingual voter classification would become the functional equivalent of national origin discrimination.

Under the 14th Amendment, all persons born in the U.S. are citizens. U.S. CONST. Amend. XIV, cl. 4. With few exceptions, the only two classifications of birth are U.S. born and foreign born. Any classification of foreign-born persons as suspect will inevitably expand beyond those using bilingual ballots to all foreign-born persons.

Any classification of the "foreign-born" would include aliens, foreign-born naturalized citizens, and foreign-born U.S. citizens. 8 U.S.C. § 1401(a)(3), (4), and (7). The rights and characteristics of each of these classes are substantially different. Any general class of "foreign-born" is overbroad as a suspect class.

There is no support in the Constitution or any federal law for presuming that foreign born persons should be subject to the special protection of the courts. In fact, throughout American history, the opposite has been true, especially for the federal government: alienage classifications, particularly in an immigration context, have consistently been upheld. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); *Unitd States v. Gordon- Nikkar*, 518 F.2d 972 (5th Cir. 1975); *Cervantes v. Guerra*, 651 F.2d 974 (5th Cir. 1981).

A new "foreign-born" suspect class would have special rights not available to most U.S. citizens. Members of this "foreign- born" suspect class would not, for

example, be subject to a routine, non-custodial investigation into crimes related to alienage status, as by profile. That result is contrary to decisions of this Court. *Florida v. Royer,* 460 U.S. 491 (1983)(profiles used in questioning airline passenger who fit drug courier profile); *United States v. Mendenhall,* 446 U.S.– 544 (1980)(drug courier profile).

This Court should not countenance the creation of a "foreign-born" suspect classification. The decision of the Ninth Circuit describing a new suspect classification should be reversed.

II. EVEN IF "RECENTLY REGISTERED, FOREIGN-BORN VOTERS WHO REQUESTED BILINGUAL BALLOTS" CONSTITUTES A SUSPECT CLASS, THE U.S. ATTORNEY'S INVESTIGATION IS NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST.

No suspect class exists for voters who are foreign-born, recently-registered and bilingual. Voters with such a combination of characteristics, none of which alone constitute suspect classifications, do not carry the traditional indicia of a suspect classification. To date, no court has held that a language-based classification is the equivalent of one based on race or national origin requiring strict scrutiny as a suspect class. In fact, courts responding to this issue have consistently held that language-based classifications are not the equivalent of national origin classifications. *See Soberal-Perez v. Heckler, supra*; *Frontera v. Sindell,* 522 F.2d 1215, 1219-20 (6th Cir. 1975); *see also Jurado v. 1150 Corporation,* No. 86- 5606, slip op. (9th Cir. April 2, 1987)(English-only on-the-job rule upheld against

claim of discrimination); *Garcia v. Gloor,* 618 F.2d 264, 268 (5th Cir.), *reh. denied,* 625 F.2d 1016 (1980), *cert. denied,* 449 U.S. 1113 (1981).

Even if a new suspect class of foreign-born persons is created, Russoniello's actions can survive strict scrutiny by this Court. The strict scrutiny standard consists of two inquiries: 1) whether the governmental objective serves a compelling state interest, *Shapiro v. Thompson,* 394 U.S. 618 (1969); *McLaughlin v. Florida,* 379 U.S. 184 (1964); and 2) whether the means of accomplishing the objective are not only necessary but also the least discriminatory means available. *Loving v. Virginia,* 388 U.S. 1 (1967); *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Shelton v. Tucker,* 364 U.S. 479 (1960).

The U.S. Attorney's objective of identifying possible criminal violations serves the compelling governmental interests of investigating possible crimes and protecting the voting process. Reasonable investigation of possible crimes has been identified as a compelling governmental interest, *LaRouche v. Webster,* 566 F. Supp. 415, 417 (S.D.N.Y. 1983), and as beyond judicial intrusion. *United States v. Chanen,* 549 F.2d 1306 (9th Cir.), *cert. denied,* 434 U.S. 825 (1977).

The fundamental principle of separation of powers prohibits the judicial branch from enjoining the executive branch's criminal investigations "in a way which encroaches on the prerogatives of [a prosecutor] unless there is a clear basis in fact and law for doing so." *United States v. Chanen,* 549 F.2d at 1313. "Only the most extraordinary circumstances warrant anticipatory

judicial involvement in criminal investigations." *Reporters' Committee for Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030, 1065 (D.C.Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); *see also LaRouche v. Webster*, 566 F.Supp. at 417 ("party seeking to enjoin a criminal investigation bears an almost insurmountable burden"). Here, Russoniello's investigatory actions were intended to determine whether there was a violation of the relevant sections of the Voting Rights Act, 42 U.S.C. § 1973dd-3(c), which punishes those who conspire to register non-citizens to vote.

As to the second inquiry of the means used, the investigation was closely tailored to disclose possible crimes in the least discriminatory way possible. The U.S. Attorney reasonably executed his investigatory powers in an attempt to identify possible voter fraud. Upon receipt of information which indicated that many recently registered foreign-born voters had been illegally registered to vote, he carefully began an investigation.

Initial efforts focused on those registrants who most likely had been improperly registered: those who were most likely to be non-citizens, the foreign-born. Then the inquiry shifted to those foreign-born persons who exhibited a characteristic likely to indicate non-citizenship: lack of familiarity with the English language, as demonstrated by a request for a non-English-language ballot. Although either or both of these requests could, if made with discriminatory intent, be unlawful, in this case, the selection was made to maximize the possibility of finding evidence of illegality.

According to the evidence available to the U.S. Attorney in this case, foreign-born persons who do not speak English well were more likely to be non-citizens who were improperly registered. The U.S. Attorney was aware that the Spanish voter registration materials erroneously said that voters "should" be citizens. Pet. App. 79a & n. 1, J.A. 122. This error may have drawn non-English-speaking non-citizens into registering, a fact which Russoniello could have relied on in selecting bilingual ballot applicants for scrutiny.

There are few alternative review techniques to investigate non-citizens voting than to use probabilities to determine likely groups for additional scrutiny. Such scrutiny has been permitted in criminal investigations, particularly in investigations involving aliens. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975); *United States v. Cortez*, 449 U.S. 101 (1981). After obtaining the names of foreign-born voters who had requested bilingual ballots, those most likely not to be eligible to vote, Russoniello further narrowed his investigation by verifying the citizenship of the registrants with the Immigration and Naturalization Service. Only those persons whom INS was unable to identify were then interviewed, by mail or in person, on a voluntary basis by the county district attorneys. In fact, 27 per cent, one in four, of Russoniello's sample of voters were determined to be non- citizens. Pet. App. 80a, J.A. 64, 180.

Ironically, the very factors by which Russoniello so carefully tailored his investigation are the ones which Respondents maintain are suspect. As citizenship is a fundamental requirement for the right to vote, the

focus on foreign birth, a strong indication of possible foreign citizenship, can hardly be invidious discrimination. The criminal activity sought was illegal registration of noncitizens. Virtually all people born in the United States are citizens. Since most non-citizens are foreign-born, any investigation into voter fraud by noncitizens must inevitably include investigations of foreign-born persons. If foreign-born persons are constitutionally protected against any investigation of voter fraud, no investigations of voter fraud involving noncitizens could be undertaken.

Similarly, the factor of recent registration does not suggest any invidious discrimination. The focus on recent registration merely narrows the investigation to those who had registered at a time when illegal registrations most likely occurred, necessarily producing persons most likely to have been witness to criminal activity.

The government's compelling interest to ensure the sanctity of the polls and its reasonable methods to enforce the laws protecting them must necessarily prevail over an incidental burden, if any, from a routine criminal investigation. The right to vote is granted only to United States citizens. It is at the core of the representative form of government. Accordingly, the government has an overriding interest in protecting this privilege and has used reasonable methods to do so.

CONCLUSION

Voter fraud by non-citizens is a national problem. In response to reliable information that those registering non- English-speaking voters might be registering per-

sons not eligible to vote, U.S. Attorney Russoniello sought to cross-check voter registration records with citizenship records maintained by the Immigration and Naturalization Service. The investigation was conducted in an unobtrusive manner using public information and included foreign-born persons as possible non-citizens. The survey produced results indicating that 27 per cent of those examined were, in fact, ineligible to vote.

The class defined by the Ninth Circuit ("recently-registered, foreign-born voters who requested bilingual ballots") does not possess the traditional indicia of a suspect class. A decision upholding the lower court's new suspect class would create a new level of classification with potentially substantial effects on alienage classifications in many federal laws, including newly-revised immigration laws.

The classification used in this investigation was rational and designed to achieve a compelling governmental interest. The state's interest in preventing voter fraud is paramount to ensuring the integrity of the franchise and equality of voting among citizens.

The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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